JUDAISM

JEWISH LAW:
Eighteen Perspectives

JACOB B. AGUS — J. DAVID BLEICH — BEN ZION BOKSER — IRA EISENSTEIN
MARVIN FOX — SOLOMON B. FREEHOF — ROBERT GORDIS
LOUIS JACOBS — IMMANUEL JAKOBOVITS — LEONARD S. KRAVITZ
EUGENE MIHALY — JACOB NEUSNER — DAVID NOVAK
EMMANUEL RACKMAN — ALVIN J. REINES
DAVID S. SHAPIRO — SEYMOUR SIEGEL
WALTER S. WURZBURGER

JEWISH PROBLEMS IN AMERICAN COURTS

Mark F. Lewis

HANNAH ARENDT — A RECONSIDERATION

Henry L. Feingold

ISSUE No. 113 / VOLUME 29 / NUMBER 1 / $2.75 **WINTER 1980**

PUBLISHED BY THE AMERICAN JEWISH CONGRESS

STATEMENT OF SPONSORSHIP

The American Jewish Congress is sponsoring the publication of JUDAISM: A QUARTERLY JOURNAL OF JEWISH LIFE AND THOUGHT as part of their basic policy to stimulate an informed awareness of Jewish affairs, encourage Jewish scholarship and adequate opportunities for Jewish education, and generally foster the affirmation of Jewish religious, cultural, and historic identity.

JUDAISM, conceived as a free and non-partisan organ, is dedicated to the creative discussion and exposition of the religious, moral and philosophical concepts of Judaism and their relevance to the problems of modern society. Through an exploration of the meaning and needs of the Jewish experience, it hopes to widen the channels of communication between Jews and to affirm Jewish verity and vitality to the world at large.

The Board of Editors, composed of distinguished scholars and thinkers drawn from every segment of Jewish life, is vested with full authority and responsibility for the contents of this Journal. Views and opinions expressed in the articles and reviews are those of the contributors and do not necessarily reflect the position of the American Jewish Congress, which is sponsoring the publication of this Journal as a service to the Jewish community and to all who seek to understand the nature of the Jewish tradition and its modern significance.

JUDAISM: A QUARTERLY JOURNAL is published by the American Jewish Congress. It appears in January, April, July and October. Office of Publication: 15 East 84th Street, New York, N.Y. 10028. Re-entered as second-class matter at Post Office, New York City, N.Y. Subscription in the United States and Canada, $10.00 for one year, $18.00 for two years, $25.00 for three years; foreign subscription, $11.00 for one year, $20.00 for two years, $28.00 for three years. Special rate for bulk (10 or more) and student subscriptions, $6.00. Single issue, $2.75; single issue abroad, $3.00. Make checks payable to the order of JUDAISM, and send to 15 East 84th Street, New York, N.Y. 10028. Allow six weeks for notice of change of address.

US ISSN 0022-5762

The Board of Editors invites articles, communications, comments and discussion for publication. Address: Editors, JUDAISM, 15 East 84th Street, New York, N.Y. 10028.

JUDAISM
A QUARTERLY JOURNAL

Issue No. 113 / Volume 29 / Number 1 / Winter 1980

The First Reader

Jewish Law as Seen From All Sides

The Summer 1979 issue of JUDAISM contained a paper entitled, "A Dynamic Halakhah: Principles and Procedures of Jewish Law." Because of the importance of this subject and the variety of approaches to the Halakhah in present-day Judaism, a representative group of scholars and thinkers were invited to express their views on the theme of the paper.

It is an index of the interest in the subject that seventeen leaders in Jewish thought have contributed to the symposium in this issue. A "Reply to the Responses" completes the treatment of the subject in the current issue of JUDAISM, at least for the present.

Church and State Sometimes Mix

The principle of the separation of church and state is deeply enshrined in the consciousness of the American people and in its legal system. Judges, in particular, have quite legitimately tended to avoid involving the secular courts in issues with a religious dimension. Nevertheless, no iron curtain separates religious from secular concerns. American courts have been compelled at times to enter into various areas which have a direct connection with Jewish religious law and practice.

In his paper, "To Do Justly," Mark F. Lewis summarizes and analyzes a large number of cases dealing with certain well-defined areas of Jewish law and custom. He indicates the basic sympathy that the judges tend to display for Jewish sensibilities and the principle of equity.

re: Letters to the Editor

Our readers are reminded that Letters to the Editor, reacting to the material in our pages and intended for publication in our columns, are welcome. They should be as brief as possible.

R.G.

HALAKHAH, AUTHORITY AND THE FUTURE OF JUDAISM

The late revered Rabbi Abraham Isaac Kook, in his *Siddur Olat Re'iyah* taught us:

> "Scholars increase peace in the world." Some mistakenly believe that world peace can be established only through conformity of ideas and characteristics (*zibhyon eḥad bede'ot utekhunot*). Therefore, when they see scholars teaching Wisdom and the knowledge of the Torah and, through their research, varying positions and approaches increase in number, they believe that these increase controversy, the opposite of peace. This is not so, for true peace cannot come to the world except through a growth in the value of peace.
>
> Increase of peace comes when all the positions and all the approaches will be clearly seen, and it will become evident that all have their place and value. For, on the contrary, even matters that seem superfluous or contradictory will then be properly recognized, as the truth of wisdom in all its aspects is disclosed. Only through the inclusion of all parts and the particulars of all views that seem divergent and all areas of division — only through them will the light of truth and right be revealed.

Our readers will be grateful, as I am, to the group of distinguished leaders, scholars and thinkers who, in spite of their many pressing commitments, graciously acceded to the invitation to respond to the paper, "A Dynamic Halakhah: Principles and Procedures of Jewish Law" (JUDAISM, Summer 1979). Their essays have, in effect, created a valuable symposium that will serve as significant source-material for the ongoing discussion of the philosophy of Jewish law. As is being increasingly recognized, this is a central issue for the viability of Judaism and its relevance to our age.

These papers are followed by my reply. I regret that my observations emerge as a rather long paper, since there are seventeen contributions to be considered. The mathematically inclined readers will note that my comments on any single paper average about a page and a half.

R.G.

*Halakhah In Modern Jewish Life**

IMMANUEL JAKOBOVITS

I

IT IS CLEARLY ABSURD TO ARGUE THAT strictly traditional Judaism, as presently interpreted, is incompatible with modern conditions of life. In fact, I daresay that never before in our history have we had so many Jews who combine a thorough rooting in secular science and culture with the strictest adherence to Jewish law and belief as we have today. If, at the same time, we also find an alarming and unprecedented rate of defections from traditional Judaism, particularly among our intellectuals, it is not because Halakhah is incompatible with modern life, but because it is unknown to them.

The second canard which requires refutation is the generalised allegation that Halakhah has ceased to develop since the suspension of the Sanhedrin 2,000 years ago, or since the completion of the *Shulḥan Arukh* 400 years ago. The vast output of Rabbinic responsa during the post-War period (running into thousands of original verdicts on the most diverse modern questions) bears monumental testimony to the dynamic character of Jewish law and its continued evolution. In my own specialised field of Jewish medical ethics, I have been able to point to significant innovations in halakhic thinking and rulings on such varied subjects as abortion, artificial insemination, euthanasia and heart-transplants, as reflected in responsa published in the past fifteen years.

II

Nowadays, it must be conceded, the general attitude of the Halakhah's custodians is predominantly ultra-conservative. The "status quo" is today's sacred cow in Israel's religio-political set-up no less than in rabbinical orientation. There are several reasons to explain it.

First, the effects of the Holocaust. Proportionately, the Torah-community was by far its worst victim. While our people at large lost one-third of its membership, the strictly observant segment suffered the destruction of as much as ninety percent. This devastating loss resulted in an extreme sense of insecurity among the survivors that was bound to breed an uncompromising determination to preserve, consolidate and expand the tiny remnants of a world which had collapsed.

---

* This paper is excerpted from a talk given at the Conference of the Memorial Foundation of Jewish Culture in Geneva, July, 1973.

IMMANUEL JAKOBOVITS *is Chief Rabbi of the United Hebrew Congregations of the British Commonwealth.*

Secondly, spiritual no less than physical forces are governed by Newton's law that every action produces an equal and opposite reaction. The massive drift to the Left, manifested in the rampant growth of secularism, religious indifference, assimilation and intermarriage, could not but generate an equal and opposite drift to the Right.

Thirdly, these tendencies towards polarisation so characteristic of our age, combined with the widespread disillusionment with the sham values of our contemporary society, especially in the younger generation, have further accentuated the ascendancy of the more rigorous school within Orthodoxy. Both custodians and seekers of traditional values prefer absolutes to uncertainties, rigidity to moderation, and the security of spiritual insulation to the risks of venturing into new areas.

This explains the strange phenomenon that, of the principal Orthodox philosophies, the post-War generation has opted for the uncompromising, anti-secular Yeshiva and Hasidic movements rather than for S.R. Hirsch's humanistic school of synthesis with Western culture.

This psychology of self-defence through withdrawal and internal consolidation also explains why the handful of Orthodox rabbis advocating halakhic innovations and religious dialogues with the world — Jewish and non-Jewish — around them, find themselves in splendid isolation and incur hostile opposition from those who are implacably opposed to any such tampering or even arguing with their heritage.

However much we may disagree with their attitude, we must concede that their policies, pursued with utter single-mindedness and passionate dedication, have proved astoundingly successful in completely reversing the pre-War trend of Orthodox decline and disintegration. Up to thirty years ago, the Orthodox were the vanishing tribe in the House of Israel, and their future seemed doomed. Today, they are the only tribe among our people which is neither vanishing nor worried about survival. Halakhic Judaism of the rigid kind, then, will play a decisive role in the revitalisation of Jewish life as well as in the physical preservation of the Jewish people and its tradition.

III

I have tried to explain why the administrators of Jewish law, in their overwhelming majority, tend to fight shy of the daring in accommodating Halakhah by bold innovations and adjustments sometimes found in former periods of stress and change.[1] With all the continued and gradual evolution to which I have referred, powerful brakes on this process admittedly do leave many modern problems unresolved.

But we must see the resultant problems in their proper perspective.

1. But the alleged inclination of halakhic authorities in former ages to modify the law is often seriously exaggerated in the idyllic reconstruction of a past that never was. Maimonides, for example, did not introduce a single innovation or enactment of Jewish law, as far as I am aware. He simply codified Talmudic and Gaonic law as he found it.

We must remember that rabbis, like other legislators, operate the law primarily for those who submit to its jurisdiction. Jews devoutly adhering to Halakhah do not complain about its severity. The complaints and the clamour for relaxations come mainly from those who do not accept these disciplines in principle. So long as the Halakhah-abiding community is in a minority, the majority cannot expect to sway the thinking and determine the decisions of those charged by their conscience and their assignment to defend the religious commitment of that minority.

Next, the evolution of Halakhah is an organic process which cannot be hastened artificially, or through popular agitation and lobbying. Four hundred and forty years elapsed between Joshua's entry into the Holy Land and Israel's spiritual fulfillment in the building of Solomon's Temple, while the composition of the Talmud covered a period that was about twice as long in order to adjust Jewish law from its Temple-centred form to patterns required by Diaspora living. In our age of seeking instant answers to timeless questions, we will have to learn anew that enduring values and spiritual originality cannot be pressed to meet deadlines.

Equally out of focus is the popular assessment of the credits and debits in the halakhic ledger. For every individual hardship case resulting from the strict application of the Jewish marriage laws, for instance, there are many thousands of Jewish homes ennobled and sanctified by these very laws. For every problem created by the occasional clash between the Sabbath laws and modern technology, there are thousands of people who, because they conscientiously observe these rules, feel once a week liberated from the mechanisation of life.

Who can measure the immense contributions to the continuity of Jewish existence of the generations of die-hards who, defying the blandishments, sneers and smears of their contemporaries, in happy submission to their halakhic dictates fiercely resisted the pressures to give up Hebrew as the language of study and prayer, or to expunge from their prayers the daily pleas for the return to Zion, and are stead-fastly determined to remain a nation apart and to live by an exacting moral code?

IV

However, I cannot absolve our religious leadership from some responsibility for these aberrations.

The designation that we use in our days is "Halakhic Judaism." I believe this novel phrase epitomises our failure far more than any alleged slowness in lubricating and reconditioning the machinery of rabbinic legislation and jurisdiction. To talk of "Halakhic Judaism" is, to my mind, itself a distortion of Judaism, just as it would be to speak of "Aggadic Judaism," or "Ritual Judaism," or "Philosophical Judaism." Authentic Judaism is an amalgam of all these.

Even within the halakhic context we have engaged, or allowed others to engage us, mainly in controversies that have few, if any, moral or

national overtones. In our encounters with the secularists, we should have concentrated our campaigns on problems they share with us and which cannot be solved without a religious conscience cultivated by halakhic disciplines, such as the evils of pornography, or the scandals of poverty and of discrimination between Orientals and Occidentals, or have emphasised the value of religious idealism as the principal motivation of Western Aliyah today, not to mention intensive religious education as the sole effective answer to the suicidal secularisation of Jewish life!

In a state or in communities where Jews loyal to Halakhah constitute the minority, the growth of our influence depends on persuasion rather than legislation, on education which explains and attracts, more than on coercion which repels. While I firmly uphold the inseparable unity of the *state* and Judaism in Israel, I wonder whether the time has not come to raise a wall of separation between religion and *politics*,[2] an alliance which no longer makes either politics holy or religion popular, and which, I submit, calls for even more urgent review than halakhic procedures if the rule of Halakhah is to prevail eventually.

V

We have, of course, no hierarchical system whereby religious rulings of universal validity can be laid down by a single authority. Any rabbi's authority extends only over communities or disciples who come under his jurisdiction. New rulings, interpretations or enactments become more widely accepted only as a consensus of rabbinical opinion emerges, usually out of published responsa on new problems or situations. This democratic process of relying on the crystallisation of a majority view among competent rabbinical experts provides the checks and balances to prevent the abuse of power or the absolutist exercise of authority.

True, historically, we had the Sanhedrin, which legislated for the Jewish people at large, though (contrary to popular misconception) its principal function was not to ease but to strengthen the observance of the law. However, its operation required two indispensable conditions, among others: its unquestioned recognition by the majority of our people, and the availability of seventy universally acknowledged sages able and willing to serve on it. Today, neither of these conditions can be fulfilled.

On the other hand, in our shrinking and increasingly interdependent world, religious policies and rabbinic rulings in one community, particularly in Israel, are bound to affect others. To achieve some co-ordination, and thanks to the initiative of my predecessor, the Conference of European Rabbis has met regularly since 1957. Its influence on the rehabilitation and stabilisation of Jewish religious life in Europe has been considerable. But, on a global scale, such consultations could prove constructive rather than divisive only if they were held informally and removed from publicity, political pressures and institutional interests.

2. Including the independence of the rabbinate from the control of government agencies or political parties.

The Principle of Polarity

EMMANUEL RACKMAN

THE THESIS THAT DR. GORDIS STATES AND proves can hardly be challenged. A number of recent publications in Israel advance and demonstrate the same conclusion: The Halakhah does respond to contemporary problems; it does cope with changed conditions; and it does not regard itself as the antagonist of the world or of human nature. But one could also make out a very good case for the antithesis: the Halakhah resists contemporary values and tries not to yield to them; it would like to change the conditions that it finds rather than change itself; and, above all, it does want to change the world and especially human nature. This antithesis Dr. Gordis' essay ignores. Yet what the moment requires — and he and I, among others, are wrestling with the problem — is clarification on when does one adopt his thesis and when its antithesis.

It was because of Dr. Gordis' writings that I became familiar with one great scholar's answer to Christians who boast that the Old Testament God is a zealous champion of vindictive justice while the New Testament portrays a God of love. His answer was simply that he could make out an equally good case for the converse. One need only pit the verses in the Old Testament that talk of God's love against an equally impressive number in the New Testament that describe God's anger and ultimate judgment. In the same manner, I can readily visualize some Orthodox challenger to Dr. Gordis presenting him with a list of topics in which the Rabbis of the Talmudic and post-Talmudic periods only magnified prohibitions and restraints. Especially was this true in an area about which Dr. Gordis himself has written — human sexuality. Perhaps because the Rabbis were so demanding in expecting males to be almost superhuman in curbing their passions, that most Conservative rabbis have read the laws pertaining to *mikveh* out of the corpus and deem them as nonexistent. But that is hardly recognition even of the authority of the Halakhah, not to mention its supremacy.

Morris Raphael Cohen's law of polarity has been very helpful to me in my understanding of Halakhah and the decision-making process that it embraces. Both Dr. Gordis' thesis and its antithesis are poles. The Halakhah approves of both. In every new problem, the poles do not change but the *posek*, the expert who must rule, gives due consideration to both. Sometimes it is the one that prevails; sometimes the other; and, at still other times, a result that reflects the influence of both poles. Yet what begs for more research and analysis is precisely what the *posek* does when

EMMANUEL RACKMAN *is president of Bar Ilan University.*

he walks the tight rope between the poles and arrives at a decision.

It may very well be that Dr. Gordis felt that he had to write as he did to publicize his thesis for the benefit of those Orthodox Jews who are committed to a rigid Halakhah — the strict constructionists. Yet he knows well that they will not be convinced by him any more than by Professors Elon or Gilath in Israel or even Soloveitchik in America. It must be, then, that he wants to justify some decisions by his own group. If so, the proper thing to do is not to seize upon only one pole, but, rather, to relate to both and to demonstrate in specific cases that, in the projected change, due regard was given to the antinomies.

I wonder whether, in connection with the Conservative movement's recent decisions with regard to women as part of a Minyan and women serving as congregational rabbis, this kind of dialectic was involved, or was it rather that, in confrontation with the women's liberation movement, decisions were made to cope with the new pressures without much regard to the law of polarity. The status of women in Jewish law unmistakably involves some deeply entrenched ideas which are in conflict with each other and veering between them is not an easy task for the creative halakhic expert.

One finds, on the one hand, a Biblical command with regard to the equality of males and females. All have the divine image. All are equally responsible to the civil and criminal code and are equally protected by it. Yet, one finds on the other hand that in Rabbinic literature there is a deep-seated distrust of males in the matter of sex. They are easily stimulated — even a woman's voice can be the cause. And the only safeguard against sexual immorality is separation — as total as it can be. Between husbands and wives many a rabbi so encouraged the practice of the art of love that even the passion of the most sexy of men is gratified. But, as between men and forbidden women, no one is to be trusted. It was not easy even to permit fathers and their daughters to be together unchaperoned. When the taboo of incest became well established, parents and their offspring were not expected to abide by the strict rules forbidding a male and a female to be together alone. However, it is because of this pole — call it a "fixation" if you will — pertaining to the weakness of the male and his uncontrollable sexual drive. (It is difficult to deny that they knew whereof they spoke — they, themselves, were male!) that the Halakhah insisted on separation of the sexes in the synagogue and domestic careers for women. From this there derive separate seating in the synagogue, the exclusion of women from most civic, communal, and religious functioning, and much else that makes the tradition offensive to many modern women.

Now, a Jewish legislator today, confronted by the two poles, somehow finds it easier to decide, as did several halakhic giants in Israel, that women can be involved in the political process as voters, and in the judicial process as witnesses and judges, but not in synagogue procedures and

leadership. So to interpret the law that the disability of women to be judges and witnesses is removed is a fulfillment of the Biblical pole of equality, and if it impinges upon the purity of thought of males, at least the sanctity of a synagogue is not thereby affected, nor is the meditation of any worshipper. Quite different is the situation where the synagogue is concerned. In that connection the other pole comes into play. And the reluctance to change the rules is great.

This also accounts in part for the unanticipated reluctance of many Conservative rabbis and laymen to break with the tradition. They are verbalizing different objections but the truth is that the pole that the innovators would ignore is deeply entrenched. Though mixed seating became quite prevalent, this was about as far as many were prepared to go. And the overwhelming promiscuity of modern times is prompting many to reconsider whether a little bit of the old-fashioned chastity and modesty —*ẓ'niut*, in Hebrew — is not a good antidote to the frightening situation in the Jewish community, with sexual permissiveness everywhere to be found.

It is not my intention in this brief reaction to Dr. Gordis' essay to make an exhaustive study of the problem of the status of women in the synagogue. I only want to suggest the difference between Orthodox and Conservative rabbis in halakhic development. The former reckon with all the poles; the latter more blithely ignore one or the other. Thus, in still another connection, the status of the Jewish woman in marriage and divorce, one can see the difference between Orthodox and Conservative rabbis, all of whom propose to correct painful inequities that exist. Simon Greenberg, on the one hand, as a last resort, would avoid one of the poles involved in the dialectic and let the Beth-Din ignore the existence of a husband when necessary, while Eliezer Berkovits offers a solution that reckons with the two poles involved and solves the problem by an agreement entered into in advance by bride and groom.

For those who do not cherish the Halakhah, the difference may appear to be pedantic. But for those who regard it as authoritative, then its own process for correction is respected and adhered to. It is this process that begs for more analysis and formulation. Perhaps Dr. Gordis will address himself to it in another essay.

Conservative Tendencies in the Halakhah

MARVIN FOX

IN HIS PAPER, DR. GORDIS SETS FORTH A philosophy of Jewish law which stresses the dynamism of the Halakhah and its responsiveness to changing circumstances. So far as it goes, his version of the Halakhah is basically sound. I shall try to show, however, that it does not go far enough, that it places the stress on one aspect of the halakhic process while largely ignoring other trends which are no less characteristic, and that, in some instances, he construes Rabbinic legislation tendentiously and thus forces it to conform to his dynamic-progressive pattern.

Any law which continues to serve as a practical rule of life over a long period and in many places must confront, and take account of, new situations and changing circumstances. If it fails to do so, such a legal system becomes effectively non-functioning, a vestigial record of a once-living law. To the extent that Gordis has stressed this point, he has underscored what is certainly true, and his limited examples, as he is fully aware, could be multiplied many times over. The great halakhists have repeatedly made the point that no system of law can ever set forth specific legislation for every possible case. The legal process is one in which the principles of the law must be applied to new situations, often such as were unanticipated, and even unimagined, by earlier halakhic authorities. One need only glance at contemporary volumes of responsa to see that they deal with new problems and changed circumstances. Modern technology, modern medicine, modern business all present the Halakhah with problems that must be addressed in a fresh way. Taken by itself, however, this is certainly not evidence of an inner drive in the Halakhah toward dynamic and progressive change. It only reflects the conditions which are necessary if the Halakhah is to serve as a norm for Jewish behavior in all social, economic, political, technological and cultural settings.

What we miss in Dr. Gordis' account is a description of the no less strong conservative tendency in the Halakhah. In general, the presumption is in favor of the established law, and change occurs only with great care and in the face of urgent necessity. The earliest authorities instructed us to "make a fence around the Torah," and their instruction constituted what became a prevailing mode of halakhic practice. So great was their concern for preserving the integrity of the law that they instituted many

MARVIN FOX *is the Philip W. Lown Professor of Jewish Philosophy and chairman of the department of Near Eastern and Judaic studies at Brandeis University.*

practices only to prevent the possibility of serious violations. A well-known principle of the law instructs the authorities even to forbid what is clearly permissible when it is a necessary measure to protect the people from inadvertent error.[1] There are familiar cases in which we are informed that the Sages suppressed rulings concerning permissible modes of behavior when they believed that to publicize them might lead to violations of the law.[2] None of this refutes the stress that Dr. Gordis has placed on the dynamic element in the process of Halakhah. It is important, however, for any accurate picture also to take full account of the deeply rooted drive to preserve and protect the already established law.

Dr. Gordis has given only passing recognition to this conservative force. As society changes, he tells us, "The spiritual and intellectual leadership in Judaism is called upon to evaluate these new elements struggling to be admitted into the sanctuary of the tradition. Some aspects it will recognize as dangerous and ill-advised and will reject in toto. Others it will judge to be ethically sound, religiously true and pragmatically valuable, and these will be incorporated into the content of the tradition." What we miss here is any clear analysis of the way in which the forces of tradition and the forces of change interact. We are not told what the criteria are for determining what is "dangerous and ill-advised" in the new society, on the one hand, and what is "ethically sound, religiously true and pragmatically valuable" on the other. The statement that, "Ultimately . . . life is the determining factor and from its decision there is no appeal," is insufficient and potentially misleading. If it means that any norms that the people adopt will finally be approved, this is both historically and religiously false. In fact, if this were the case, then we would have no law at all, but only an ongoing record of the culture patterns of various times and places. Obviously, Dr. Gordis has no intention of propounding such an absurdity. Short of this, however, we must have some criteria, some principles of decision. Since the Halakhah, in its development, does discriminate, sometimes affirming and supporting what "life" has brought about and sometimes rejecting it forcefully, we can have a sound theory of Jewish law only if we can extrapolate from the law itself the principles which guided the legislators.

While there is much to support the claim that "the Halakhah began with life" and that the technique of Mishnah derives "its impetus from life," this is only part of the story. The Mishnah, which was redacted more than a century after the destruction of the Temple, contains extensive sections that are concerned with the Temple service. A complex body of law which had been inoperative for a considerable time is recorded and codified. A striking later example can be found in the *Mishneh Torah* of Maimonides, in which he recorded the entire corpus of law almost as if the

1. For instances of the principle, *Halakhah v'ein morin ken*, see *Shabbat* 12b, *Beẓah* 28b, *Menaḥot* 36b.
2. See, e.g., *Shabbat* 153b.

monarchy were still in force and the Temple service still a daily occurrence. When Maimonides set forth the pattern of practice for Passover eve, it was as if the Temple were still standing. After a detailed discussion of the law he notes, in a tone that seems almost an afterthought, that "in our day, when we no longer have sacrifices," the procedure differs.[3] The codified Halakhah is far more than just a response to life. It is a set of ideal structures which sets a standard according to which Jewish life is to be shaped. In some measure the Halakhah, it is true, reflects life as it is. In greater measure, it teaches us what life ought to be.

The imbalance in Dr. Gordis' presentation becomes clearer when we study his particular examples. He cites the limitations which Rabbinic practice put on capital punishment as "the best known instance of the Halakhah responding to deepening ethical insights." We cannot debate here the question whether Rabbinic safeguards were merely imposed on Biblical law, or whether the Rabbis correctly read the intent of the Biblical text. Such debates are likely to degenerate quickly into polemics over issues of dogma and are never very fruitful. We can, however, examine the evidence which claims that the law was changed to accord with "the deepening ethical insights" of the Rabbis. A study of Rabbinic views on capital punishment must consider materials which Dr. Gordis has chosen to ignore. The Mishnah does, of course, cite the statement of Rabbis Akiba and Tarphon that if they had been members of the court no executions would ever have taken place. Let us not overlook the fact that the same Mishnah also quotes Rabban Simeon ben Gamaliel's critical comment that the policy of his colleagues would have caused an increase in the number of murderers in society. Even at this stage of the discussion there was no unanimity on the desirability of eliminating all capital punishment. Rigorous procedural safeguards were introduced to protect the accused in capital cases. There were cases, however, even in the Mishnah itself, in which all such safeguards were set aside. Cases are noted in which it is ruled that the violator, although not subject to capital punishment according to law, should be confined under conditions from which his death would inevitably result.[4] This is hardly a denial, on some presumed advanced ethical ground, of all capital punishment.

The same authorities who were most meticulous in recognizing the binding force of the procedural safeguards did not hesitate to violate all those safeguards when public welfare seemed to them to demand it. Consider just one such instance. The Mishnah rules that no circumstantial evidence is admissible in cases involving capital punishment.[5] We are told that R. Simeon b. Shetah once saw a man pursuing another into a ruin. He followed him in and found the pursuer standing over a murdered man. In the pursuer's hand was a sword dripping with blood. Yet, so great was the

3. *M.T., Ḥamez* 8:8.
4. M. *Sanhedrin*, 9:5, 6.
5. Ibid., 4:5.

constraint of the law of evidence that R. Simeon could do nothing to bring him to justice, since he was only one witness and his evidence was not direct, but circumstantial.[6] In another case, however, the Mishnah informs us that the same R. Simeon b. Shetah caused eighty women to be hanged on a single day.[7] It is clear from the context and the discussion that follow that his action was not in accordance with established law, but was, rather, an emergency measure instituted for the public good. In the *Gemara* the point is made that a Rabbinic court may impose such extreme penalities even when not legally justified by the Torah, "not with the intention of disregarding the Torah, but in order to safeguard it."[8] Whatever the ethical sensitivities involved here, they certainly were not categorically opposed to capital punishment. Perhaps we should add that this permission to impose death sentences, even when not warranted by law, is reaffirmed in the later codes [9] We also have definite evidence that, in medieval times, capital punishment was still practiced in very select cases.[10]

My purpose is not to question Dr. Gordis' statements concerning the severe limitations on capital punishment in Rabbinic law, but only to show that there is another side to the story. We must consider all aspects of the law before we come to conclusions about the ways in which supposedly new ethical sensitivities manifest themselves in a changing law. What we have in the case of capital punishment is conflicting values, each of which is legitimate and seeks practical expression. The preservation of human life and the respect for the dignity of the individual are deeply rooted in the Jewish tradition. Concern for public welfare — spiritual as well as physical and material — is also deeply rooted. Both are legitimate ethical principles whose source is in the Torah. The differing legal rulings and practices reflect differing circumstances. In each case we have an old, rather than a new, ethical value. And in each case it is essential to find legal ways to preserve these values. Sometimes the primary stress is on the preservation of individual human lives. At other times, human life is treated rather lightly in the face of serious threats to the welfare of the community.

Dr. Gordis cites the case of levirate marriage as another instance in which new ethical values brought about a change in the law of the Torah. According to his account, Rabbinic legislation gives *ḥalizah* precedence over *yibbum*, contrary to the explicit Pentateuchal preference for *yibbum*. But this is only partially true. It should be noted that even so late a code as the *Shulhan Arukh* of Caro, following Alfasi and Maimonides, rules that

6. *Sanhedrin* 37b.
7. M. *Sanhedrin* 6:4.
8. *Sanhedrin* 46a.
9. *M.T., Sanhedrin* 24:4.
10. See, e.g., the discussion on this point in Menahem Elon, *Hamishpat Haʿivri*, (Jerusalem, 1973), Vol. 2, pp. 435, 648.

yibbum takes precedence over *ḥalizah*.[11] It would seem that this was not merely an "option" in Muslim countries, as Dr. Gordis would have it, but a required practice. Even in the case where *ḥalizah* is given preference, we do not simply have new ethical values entering into the law. The very Rabbinic sources which he cites make us aware of the fact that the authorities saw a deep conflict between what they construed as the intention of the Torah and the attitudes of the typical *yabam* in their times. In their reading, the act of *yibbum* was legitimate only if it was the pious fulfillment of a duty. When it was motivated by personal interest it became unacceptable. This is what is implied in the statement that, "One who marries his brother's widow because of her beauty or because of lustful desire for her is considered as engaged in prostitution, and it is likely that a child born of such a union is illegitimate."[12] Certainly, the doctrine that there are commandments which we must fulfill as pure duty, and not for personal satisfaction, is not a new conception. If it is the case that the Torah considers *yibbum* the most desirable act, it is no less the case that it provides for the option of *ḥalizah*. When the Rabbis judged that the intent of the Torah was being frustrated rather than realized by *yibbum*, it was certainly consistent with established values for them to give preference to *ḥalizah*. Obviously, the judgment was not universal, since so many distinguished authorities continued to insist on *yibbum*. Only when monogamy was made mandatory for all Jews was *yibbum* made impossible. In this latter case Dr. Gordis is certainly correct when he holds that we have a genuine instance in which social change has affected Jewish practice. The shift to a preference for monogamy, and then to a rule which forbids polygamy, is unquestionably an instance in which the standards of society served as a determining force in the law.

Dr. Gordis also finds an instance of "new ethical insight" in the Rabbinic treatment of the rules of inheritance. As he reads the Biblical text, its unequivocal intention is that the eldest son shall receive two-thirds of his father's estate. Yet, Rabbinic law construes the term *pi sh'nayim* to mean a double share rather than two-thirds of the entire estate. According to Dr. Gordis, the Rabbis were moved to a misinterpretation of the verse in order to satisfy "their standards of equity." He may well be right, but he has certainly not provided us with decisive evidence. Let us consider some counter-evidence. Granted that, in the cases cited in 2 Kings and Zechariah, the meaning of *pi sh'nayim* is unquestionably "two-thirds," it does not follow that it must mean two-thirds in every case. The passage from *Sifrei Devarim*, which contains the Rabbinic reasoning on this subject, stresses the ambiguity of the Biblical verse. In the other two cases, the meaning of *pi sh'nayim* is not open to any question, but in the case of inheritance its meaning is less certain. It *could* mean a double share,

11. *E.H.*, 165:1.

12. P.T. *Yebamot*, Ch. 1, Hal. 1, 2b. and parallels in *Bavli* and *Tosefta*. For the interpretation of *leshum debarim aḥerim* as sexual lust, see, S. Lieberman, *Tosefta Kifshutah*, Vol. 6, p. 57.

and the Rabbis do not decide arbitrarily, but offer evidence to support their interpretation. Now, if their main concern is their more advanced "standards of equity," by what rule of equity do they assign a double share to the eldest son only because he he was born first? In Biblical times the eldest son succeeded his deceased father as both temporal and spiritual head of the family, with full responsibility for maintaining, protecting, and supporting the family. Under these circumstances, even a two-thirds share of the estate might not be fully just. The eldest son assumed responsibilites identical with those of his father and had to meet them with more limited resources. But once that set of responsibilities no longer rests on the shoulders of the eldest son, why should he receive anything more than his brothers?

Dr. Gordis assumes that the Rabbis read into the Torah their newly developed sense of justice. As he puts it, "They never doubted that the Torah, being the word of God, embodied the highest level of justice; anything else would be unthinkable." Once they were clear about what constituted the highest standard, they presumably had no choice but to construe the Torah so as to conform with their moral ideals. Is this, in fact, what happened? If so, why did they not move toward full equity and deny to the eldest son anything more than his brothers received? It is no answer to say that they were bound by the literal word of the Torah. We have enough instances, including some which Dr. Gordis cites in his article, in which the literal word of the Torah was explicitly set aside. There are even familiar cases where this happened with respect to rules of inheritance.[13] The explanation in each of these cases is complex and cannot be reduced simply to a matter of new ethical standards. Even more complex is the effort to explain why, in some cases, the Rabbis seemed unhesitant about setting aside (by whatever exegetical devices or by the power of *takkanah*) literal readings of the Torah, while in others they felt bound by the literal text. I do not believe that easy references to developing ethical standards provide a sufficient answer. If this is, in fact, the answer, then it must be supported with far more substantial evidence than we have in Dr. Gordis' paper.

I do not question at all the basic thesis which Dr. Gordis advances. Jewish law has certainly changed over the centuries. It has unquestionably responded to changing social conditions, both within the Jewish community and in the larger general society. We are, however, far from having a complete and accurate account of the inner processes by which these changes occurred. The stress which Dr. Gordis puts on "new ethical insights" as the ground and motivating force for many of these changes leaves many questions unanswered. Were there, in fact, new ethical standards? If so, what was their source and on what ground did they rest? How did the Rabbis reconcile their conviction that the Torah is God's

13. For one such case see *Ketubot* 52b.

word with the supposed view that its ethical standards are deficient? How could they accommodate (if they did) within their system a set of moral criteria which were outside of, and superior to, the Halakhah? Finally, with what justification can we speak in these regards of the "teachings of the Rabbis" as if they were monolithic? Are we not obligated to deal with the individual Rabbinic teachers and with the various sources in a most careful way in order to determine their individual views before we can speak of general doctrines? At the present stage of our learning we know too much to fall into the old errors of treating the vast Rabbinic literature as a monolith. We also know too little to be able to answer any of our questions in a fully satisfactory way. Dr. Gordis has opened up a discussion of matters which demand of scholars intense and concentrated work. Many individual puzzles have to be solved before we shall be ready for broad characterizations of the methods and doctrines of the large number of teachers whose sayings constitute the Rabbinic literature. We have a long way to go before we shall be able to give a sound and comprehensive account of the processes of change in Jewish law and of the theoretical foundations on which those processes rest.

Departure

BERNHARD FRANK

He drove out the man; and at the east of the garden of Eden he placed the cherubim, and a flaming sword which turned every way.

Sonic summer swings her gate — shut.
A gleam of metal reverberates
across a sea of mud —
Those wings but barely stilled
shed yet a feather on the hill —
Those eyes — so dreadful
to behold —
hold yet a gleam of tenderness.

They stumble — dazzled — down the path
(their bundle — hope & vitamins,
& tins & tins of doubt);

A flame of wonder reaches out
from him — to her —
he swears to make her happy
on this earth,
to build another paradise
for her — from him.

No Abrogation

DAVID S. SHAPIRO

IN HIS PAPER ON THE DYNAMIC HALAKHAH, Robert Gordis has demonstrated the character of Halakhah as a growing and expanding enterprise. Halakhah is dynamic, not static. It is flexible, not rigid. It is responsive to the world and open to all human needs.[1] He attributes the growth and flexibility of Halakhah to two factors: first, the necessity to respond to external conditions — social, economic, political or cultural; and second, the need to establish new legal norms on the basis of novel ethical insights and attitudes.

That there was a need to respond to new situations is obvious. Every generation gives rise to new problems that must be coped with. How do legal systems handle new situations? Antiquated laws may be retained at all costs, or they may be reinterpreted, amended or abrogated. Another alternative is to study the language of the laws very closely and, at the same time, seek to penetrate into their spirit. What methods are applied in Halakhah? That the sages of Israel have been endowed with broad powers of abrogation is explicitly stated in the Talmud. Certain aspects of positive commandments may be permanently abrogated when there is an overwhelming need to protect the major institutions of Judaism or to preserve persons from great hardship and distress.[2] No positive commandment, however, may be abrogated *in toto*. A negative commandment may be abrogated in part only temporarily for similar reasons.[3] Needless to say, it is inconceivable that the Rabbis would uproot any negative commandment on a permanent basis. Throughout the generations, they were firm believers in the divine origin of the Torah and would not dare tamper with it.[4] The right to make the changes referred to was undoubtedly invested in the supreme legislative body of Jewry. I do not believe that there is any evidence that this prerogative was exercised by any Rabbinic body after Mishnaic times.

The sages of Israel also introduced amendments to Biblical law.

1. Cf. my *Studies in Jewish Thought*, Vol. I, p. 125 and p. 138, note 16.
2. *Yevamot* 89b.
3. Maim., *Mishneh Torah, Mamrim*, II, 4. See also J.T., *Shabbat*, I, 4, end. Cf. *Tosafot, Yevamot* 88a, *s.v. mitokh*; 89b, *s.v. kevan*; notes of R. Akiva Eger 88a and R. Zvi Hirsch Chajes for additional references. See also RShBA to *Nedarim* 90b; R. Nissim, ibid., and notes of R. Solomon Eger, *ibid.* (at the end of tractate). The Tosafists endow the Rabbis with greater powers of abrogation by creating a change of status or by the power of confiscation granted to courts. The present-day refusal of Rabbis to employ these extraordinary powers is, to a great extent, the fear of their misuse, for which the examples are numerous, especially since there is no unified governing religious body recognized by all Israel.
4. On the problem of *Tikkunei Soferim* see Saul Lieberman, *Hellenism in Jewish Palestine* (New York: Jewish Theological Seminary of America, 1962), pp. 28ff.

DAVID S. SHAPIRO *is the rabbi of Congregation Anshe Sfard in Milwaukee, Wisconsin.*

These could be extensions or refinements of Biblical law (*gezerot*), or enactments, whose purpose was to promote racial peace and tranquillity and improve the quality of human society (*takkanot*).[5] Such amendments have been added to the corpus of Jewish law from time to time and up to the present day; in some cases they were accepted by all of Jewry, in other cases only by a more limited segment.[6]

Another method employed by the sages is that of *midrash*, which is a depth-analysis of the Biblical text, whose meanings are exhaustively studied in the light of the spirit of the text and its linguistic usages. There are, in addition, the oral traditions which illuminate the Biblical texts and provide clues as to their application. The interpretation of Biblical texts as a guide for practice has seldom been used in post-Talmudic times.[7]

Let us now examine the examples cited by Dr. Gordis as instances of abrogations of Biblical law carried out by the Rabbis to conform with new conditions. Are these really so? Were these changes not made in consonance with the demands of the law itself? Are these changes not the product of depth-analysis of the Biblical text and legitimate exegesis? The first example cited is that of the *ʿeglah ʿarufah*, the "decapitated calf" (Deut. 21:1-9).

The Mishnah states: "From the time that murders were on the increase, the rite of *ʿeglah ʿarufah* was abolished."[8] On what grounds did this abolition take place? It is simply an application of the law of the Torah itself which states very explicitly that when a corpse is found on the ground near a city and it is *not known* who the murderer was, the rite of the *ʿeglah ʿarufah* is to be carried out. It is clear that the Torah is speaking of a situation where such an incident is most unusual. The rite does not apply under conditions where murders are rampant and the perpetrators well-known but cannot be brought to trial (whether because of lack of proper evidence, collusion with authorities, or absence of a strong government). The Mishnah is referring to such a period, towards the close of the second Commonwealth. Hence, the rite of *ʿeglah ʿarufah* does not apply under these circumstances.[9] This is not a case of abrogation but of application.

The second example cited by Dr. Gordis is that of the *wayward woman* (*sotah*) who is to drink the bitter waters. The Mishnah states: "When

---

5. *Gittin* 32a–62a.
6. Cf. Menahem Elon, *Ha-Mishpat Ha-Ivri* (Jerusalem, 5733), Vol. II, pp. 547 ff.
7. Cf. Asheri, *Gittin*, IV, #20; Maimonides, *Mishneh Torah, Nedarim*, VI, 32–33; *Rotze'aḥ*, II, 14, where Biblical texts are used as source material for halakhot. There is also a wealth of such material, not incorporated in the Codes, in the great Biblical commentaries, such as *Haamek Davar* and *Meshekh Ḥokhmah*, in addition to the earlier commentaries. See also R.A.I. Bromberg on R. Joseph Saul Nathanson and his usage of Biblical texts as halakhic sources in *Sinai*, Vol. 22, No. 13, (Elul, 5719): 370–376.
8. *Sotah*, IX, 9.
9. Cf. *Tosefta, Sotah*, XIV, 1 and Lieberman, *Tosefta Ki-peshutah*, Vol. VIII, pp. 750–751. Also *Sifre* (ed. Finkelstein), p. 240 and sources cited there; *Midrash Tannaim* (ed. Hoffmann), p. 123.

adulterers increased, the rite of bitter waters was abolished."[10] In support of this move, Hosea 4:14 is cited. The *Gemara* cites a Pentateuchal text in support of cessation of this practice, *viz.*, the passage in Numbers 5:31: "And the man shall be clear from iniquity, and that woman shall bear her iniquity." The Rabbis found this verse totally superfluous, as it appears to be stating the obvious. There is no more reason to assume that the Torah uses redundant language than does any legal text. The Rabbis (rightfully, I believe) understood this text as containing a condition: if the husband is clear of sin, then the woman will be tested by the bitter waters. Where the husband is as guilty of immoral behavior as is the wife, the test will be ineffective. [The legitimacy of this interpretation of the Hebrew text is borne out by BDB, Hebrew and English Lexicon of the OT, p. 254, 2d.] Here, too, there is not a case of abrogation, but of the application of the Biblical law to the circumstances where the ordeal cannot serve its purpose. Such were the conditions during the latter days of the Second Commonwealth when the upper classes were permeated with Hellenistic and Roman attitudes, and adulterous behavior was an everyday occurrence.[11]

The second motivation suggested by Dr. Gordis as a force propelling the Halakhah forward is the presence of new ethical insights and attitudes that represent movement beyond earlier positions. He cites two instances that testify to the ethical consciousness of the sages and their reinterpretation of the Torah-legislation in the light of their new ethical insights. I beg to differ that these are insights of the sages. They are insights of the Torah itself that are brought to the fore by the sages when the time is ripe for their implementation. The growth and development of basic Halakhah is thus intrinsic, not extrinsic, flowing out of its original source.[12]

The first example cited by Dr. Gordis is the law of inheritance. According to him, the meaning of the Biblical ruling that the first-born is to receive *pi sh'nayim* of the father's possessions (Deut. 21:17) applies to two portions out of three, namely two-thirds of the entire estate. The Rabbis could not bear the thought that the Torah meant this, and therefore, they reinterpreted the term *pi sh'nayim* to mean twice the share of any other brother and not two-thirds. "To reach the desired conclusion," Gordis writes, "the clear-cut passages in Kings (II Kings 2:9) and Zechariah (13:8) are passed over in silence. The reason is clear. The Rabbis sought to limit the prerogatives of the first-born, so that in a family of five sons, for example, he would receive two-sixths and not two-thirds of the patrimony." The truth is that the Rabbis did not pass over these verses in silence. See *Midrash Tannaim* (ed. Hoffmann), p. 129 where the passage from Kings is cited and is actually interpreted as meaning double

10. *Loc. cit.*
11. Cf. *Tosefta, loc. cit.*
12. Cf. my *Studies* (see note 1) and p. 139, note 19.

and not two-thirds. Cf. also *Sanhedrin* 47a (cited by Hoffmann in note). Moreover, it is not in vain that the Biblical text gives the example of a family of only two sons, where *pi sh'nayim* means two portions more than the second son receives (though this amounts to two-thirds of the entire estate). What evidence is there that the Biblical text provides for the first-born to receive two-thirds of the entire estate when there are more than two sons? There is no good reason to question the identity of the Rabbinic interpretation with the original meaning of the text. Even if the passage in Kings is to be interpreted as two-thirds, it would by no means have confirmed Gordis' understanding of the original meaning of the passage in Deuteronomy. In Kings we are dealing with one spirit — two-thirds of the spirit of Elijah. Likewise, in Zechariah, the two-thirds refers to one entity — humanity. We therefore have no evidence that *pi sh'nayim*, in the sense of two-thirds, could apply where there are more than two heirs.

Another example cited by Dr. Gordis is that of the rebellious son (Deut. 21: 18-21) which, he maintains, the Rabbis limited, so as to make the law totally inoperative. If one examines the Biblical text he will discover that all the Rabbis did was to draw out all the implications of the original document, which may contain many superfluous words, and which, as in every legal document, must be taken very seriously. Let us look at this passage:

> If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them; *then shall his father and his mother lay hold on him*, and bring him out unto the elders of his city, and unto the gate of his place; *and they shall say unto the elders of his city: "This our son is stubborn and rebellious, he doth not hearken to our voice*; he is a glutton and a drunkard . . ."

All the italicized words are, on the surface, superfluous, but even a human legal text does not use superfluous words, much less a text of divine origin. The Rabbis were right in concluding that these words contain qualifying conditions for carrying out the harsh sentence against the wayward son. The ethical insights are those of the Torah itself (cf. Commentary of R. Samson Raphael Hirsch *ad locum*.)[13]

Dr. Gordis cites the limitation of capital punishment by the Rabbis as evidence of the operation of new ethical insights. Here, too, the ethical insight is that of the Torah itself. It declares: "At the mouth of two witnesses, or three witnesses, shall *he that is to die* be put to death" (Deut. 17:6). The words "he that is to die" are totally superfluous, or a substitute for the word "the guilty one." The Rabbis deduced from this usage that the Torah meant that the culprit must declare himself ready to die before committing the crime to deserve the death-penalty. It might also be noted that the term "he that is to die" (*met*) is elsewhere employed in the sense of

13. See also my comments in *Or-Hamizrah*, Vol. XVIII, No. 1, pp. 24–25.

those who are spiritually dead. Thus, the "dead do not praise the Lord" stands in contrast with those who "shall praise the Lord forever" (Psalm 115:17-18). The term *metim* refers to those who, like the gods they worship, are condemned to be deprived of all life-giving qualities (Psalm 115:4-8). It might also be pointed out that the Hebrew *ed* (witness) is derived from the root *ud*, which also means to warn and exhort.[14] Hence, the halakhic ruling that before capital or corporal punishment may be administered, the witnesses must have admonished the would-be offender beforehand.[15]

In the case of the false witnesses whose execution was limited only to the case where they plotted unsuccessfully, the basis of this ruling is the phrase in Deut. 19:19 *ka-asher zamam* (as he plotted), to which the Rabbis append: *ve-lo ka-asher asah* (not as he has done).[16] This is not to be taken as a mere Rabbinic fancy based on a novel ethical insight. Any examination of the Biblical use of the verb *zamam* will demonstrate that it is either followed by another verb signifying fulfillment or it is followed by a statement of non-fulfillment. Since the Pentateuchal *zamam* is not followed by *asah* it is correctly assumed by the Rabbis that the plot has actually failed and, in this case, the witnesses are punished.[17]

Dr. Gordis' assertion that Hillel was responsible for the ruling that only the creditor may not collect his debts in the Sabbatical year, but that debts transferred to the courts are collectible, is not based on solid evidence. Hillel, in issuing the *prosbul*, was basing himself on a long-established ruling, also derived from the redundancies in the Biblical text.[18]

The contention that the ban against multiple marriages by R. Gershom was due to the influence of Christian society is, to my mind, questionable. Gordis himself maintains that monogamy had been the prevailing practice of the Jewish people from the very beginning. Christian monogamy in the Middle Ages was undoubtedly based on the Biblical ideal represented by Adam and Eve. Even in Muslim countries, polygamy among Jews was rare and could not be contracted without permission of

---

14. In the *hif'il* form: *haed*.

15. Sanhedrin 40b–41a. The other citation in Sanhedrin 41a is also based on a redundancy in the passages in Numbers 15:32–33:32: "And when the children of Israel were in the wilderness *they found a man gathering sticks* upon the Sabbath day. (33): *And they that found him gathering sticks* brought him unto Moses and Aaron." It is obvious that the phrase italicized in verse 33 is superfluous. The phrase was interpreted by the Sages, since it is a legal text, as referring to a continuing process, since it is couched in the present tense, signifying a continuing action. The culprit was *continuing* to gather wood, implying that he had been warned to desist and paid no attention. Hence, the law of forewarning.

16. On the source of this expression (not found in our primary sources) see my *Midrash David* (Milwaukee, 1952), p. 192.

17. Besides the traditional and modern commentators who have discussed this subject, see Dr. David Hoffmann in his *Responsa, Melamed Le-Ho'il*, Section III, pp. 142–147.

18. See Deut. 15:1–2: "At the end of every seven years thou shalt make a *release*. And this is the manner of the *release*; every creditor shall *release* . . .; *he shall not exact it* . . . because the Lord's *release* hath been proclaimed." Cf. *Sifre* (ed. Finkelstein), p. 173, 11, 13–14.

the first wife. It is very likely, therefore, that the ban against polygamy in the eleventh century resulted not from an improvement in moral outlook but, rather, from the reverse. This view is confirmed in Prof. Salo Baron's monumental work[19] where he says:

> Gershom's ordinance was no innovation in European life. Under the impact of Islam, however, some wealthy Eastern Jews must have wished to indulge if not in a regular harem or the Islamic quota of four wives, at least in marrying another wife if their first wife was ill or barren. With the increase of Eastern Jewish immigration into Western lands and the spread of Eastern literary sources clearly showing the permissibility of plural marriages,[20] some individuals may have begun clamoring for their reintroduction into Western communities as well. This demand now appeared more feasible as segregation between Jews and Christians grew tighter and Jewish leaders were given ever greater leeway in the management of Jewish affairs . . .

Very likely the ban against divorcing a wife without her consent may have been prompted by a misuse of this halakhic prerogative which certainly was always regarded as contrary to the Jewish moral conscience and the spirit of the law, if not its letter.[21]

Dr. Gordis' reference to the responsiveness of the Halakhah to the popular will is highly exaggerated. There is no such thing as *yielding* to the popular will in Halakhah, except on minor issues which do not touch the core of Jewish law. Popular *practice*, rather than popular *will*, is sometimes used to establish a halakhic norm where no ultimate ruling is available.

Dr. Gordis cites the example of Rabban Simeon ben Gamaliel in the Mishnah *Keritot* I, and that of the Amora, Samuel, in *Pesaḥim* 30a as evidence that the Rabbis did not hesitate to make the Halakhah responsive to current needs by *drastic* modifications (the case of Samuel in *Sukkah* 34b could also be cited). While modifications of Halakhah for overwhelming reasons are within the competence of the sages of Israel, it should be pointed out that in these cases cited there was no *drastic* modification, but the application of a minority view by the Rabbis against their own opinion (or against the accepted opinion) to help the poor.[23] The Halakhah

---

19. *A Social and Religious History of the Jews*, Vol. VI, (2nd ed.), p. 137.
20. I do not know what literary sources Dr. Baron is speaking of. The permissibility of plural marriages can be found also in traditional Jewish sources.
21. See *Gittin* 90b; *Sanhedrin* 22a. The reference to Asheri, *Responsa* 42:1 in Dr. Gordis' note 37 applies not to plural marriages but to the ban against a divorce without the wife's consent.
22. Cf. *Berakhot* 45a and parallel passages.
23. On the action of Rabban Simeon ben Gamaliel, see Rashi to *Keritot* 8a, the Novellae (*Ḥiddushim*) at end of tractate 8a, *Tiferet Israel* to Mishnah (in *Boaz*), *Baba Batra* 166a–b, RShBM and *Tosafot, ibid.* Dr. Gordis asserts that the introduction of family pews in Conservative Synagogues is an illustration of the triumph of the popular will. This may be so, but it is not its triumph in Halakhah. Dr. Gordis compares this innovation to the creation of the festival of *Simḥat Torah*. The only difference is that *Simḥat Torah* was established, even if with some minor variances with accepted norms, by Halakhah-oriented and Halakhah-abiding communities, communities hungry to express their love for the Torah. The innovations of a popular will that derive from a non-halakhic-oriented and non-halakhic-abiding community cannot serve as a valid halakhic factor.

recognizes the validity of minority opinions when occasions for their application appear.[24]

The statement by Dr. Gordis in reference to *heter ʿiska* should be corrected. He states that according to the document "the lender became a partner *pro forma* in the business enterprise of the borrower, thereby *protecting the lender against any loss and guaranteeing him a minimum fixed 'profit'". If I understand the heter ʿiska* correctly it insures only one-half of the loan against a loss. The other half, which is given in trust, is the source of profits or of losses which must be accepted by the lender, in addition to the salary that he pays to the borrower for engaging in the presumed profitable business enterprise.[25]

The above comments are not intended by any means to deprecate the efforts of scholars of past or of present generations who are seeking ways to solve the problems which confront Jews who love the Torah and wish to see in it a source of joy and happiness. The Torah was given to man to help him achieve a blessed life on earth and in eternity. Nevertheless, it is not a simple task to bring about those changes that will help us achieve this goal.[26] This can be brought about only by men of total commitment to the divinity of the Torah, both Written and Oral, in thought and life, who are masters of the Torah in its entirety, including a broad knowledge of secular disciplines and thought, maximal in *yirat shamayim* and minimal in *mora basar va-dam.*[27] Not in vain do we pray thrice a day: "Restore our judges as of old and our counselors as at the beginning and thus remove from us grief and heartbreak."

---

24. *Eduyot*, I, 5.
25. See *Yore De'ah* 167 and commentaries. Dr. Gordis is, of course, right that there are ways in an *iska* of guaranteeing principal and profits by setting certain conditions. See *Op. cit.* 177, 5. Dr. Gordis' statement that the Talmud permitted *avak ribbit* is, however, incorrect. See *Baba Metzia* 61b.
26. Cf. my *Studies in Jewish Thought*, pp. 427–8.
27. Cf. comment of S.D. Luzzatto in his Commentary on Lev. 7:18.

Is Sociology Integral to the Halakhah?

WALTER S. WURZBURGER

WITH CHARACTERISTIC APLOMB, BRILLIANCE and erudition, Robert Gordis, in his essay "A Dynamic Halakhah" (JUDAISM, Summer 1979), persuasively presents the case for a dynamic, ever-evolving Halakhah. But for all the cogent arguments and the impressive array of extensive scholarship marshalled in its behalf, one still wonders whether the evidence really supports his central thesis. Were he merely interested in showing that halakhic developments have been affected by socio-cultural transformations, there hardly would have been any need to amass such an enormous wealth of data to document what by now is, after all, a commonplace. But Rabbi Gordis certainly cannot be accused of tilting at windmills. What is so striking in his thesis is not the insistence upon the evolutionary character of the Halakhah, but, rather, the specific interpretation of the dynamics governing its development.

Yet it seems to me that the data adduced by Rabbi Gordis could easily have been accounted for by a far less sweeping theory which would not call for such drastic revisions of the classic approach to Halakhah, and which would, therefore, more closely reflect the self-understanding of the individuals who were actually engaged in the application of halakhic rules to contemporary realities throughout history. What I find so disturbing in Rabbi Gordis' thesis is the notion that "sociology" is an integral component of Halakhah itself. The real issue between Rabbi Gordis and those who advocate a more traditional approach to Halakhah is not whether, or to what extent, changes in cultural, social, historical realities manifest themselves in the process of halakhic development, but, rather, whether in this evolutionary process, "sociology" — as Rabbi Gordis claims — functions as an integral part of Halakhah itself, not "something extraneous to it."

Significantly, Rabbi Gordis takes great pains to disassociate himself from any view which treats Halakhah's relationship to culture in terms of *confrontation*. Such an approach, it is alleged, smacks of hostility and triumphalism. But it appears to me that the term "confrontation," if taken without any negative emotive connotations, best describes that relationship. After all, it is the function of the Halakhah to provide *normative* guidance for concrete life situations arising within a given cultural-social context. Since it seeks to spell out the meaning of the "Torah of life" in the light of the specific conditions prevailing within a given age, the Halakhah must consider socio-cultural conditions, especially in view of the fact that a

WALTER S. WURZBURGER *is the rabbi of Congregation Shaaray Tefila, Far Rockaway, N.Y. He also teaches Judaic Studies at Brooklyn College and philosophy at Yeshiva University.*

variety of halakhic provisions such as *tikkun haolom, darkhei shalom*, etc. mandate concern for factors varying with the vicissitudes of historic exigencies and changing value perceptions.

But the fact that the meaning of the Halakhah for a particular generation must be examined in the light of the temporal condition, prevailing at a given period, hardly warrants the inference that the halakhic process represents a continuous "interaction between contemporary culture and received tradition" because sociology, allegedly, is an integral component of Halakhah.

To begin with, from a purely conceptual point of view, I experience considerable difficulty with the notion that "sociology" forms an integral part of Halakhah. How can a purely descriptive discipline such as sociology yield prescriptive content? Ever since David Hume it has become fairly widely acknowledged that from "is" to "ought" there is no inference.

But far more disconcerting are the implications that Rabbi Gordis seeks to draw from what appears to me to be an incorrect interpretation of the dynamics of halakhic development. His analysis creates the impression that whenever culture collides with established halakhic opinion, halakhic jurisprudence sooner or later manages to accommodate itself to the dictates of socio-cultural realities. Rabbi Gordis does not indicate the crucial point that, insofar as the traditional Halakhah was concerned, no modifications could be introduced unless they conformed to the legitimate methods and procedures of the halakhic process. But, it is one thing to accommodate cultural changes by utilizing procedures sanctioned by halakhic methodology, and another thing — as Rabbi Gordis suggests with respect to the legitimization of family pews — to bow "to the popular will which has been allowed to prevail because the leadership recognized important social and ethical values in the practice and no contravention of any vital religious principle."

What is missing in Rabbi Gordis' treatment of the authority of the Halakhah is a thorough discussion of the source, range, scope and limits of whatever authority is enjoyed by the expositors of the Halakhah. Thus, he does not indicate that, in the opinion of most medieval authorities, the institution of the *prosbul* was feasible only because the Biblical law mandating cancellation of debts in the sabbatical year was already no longer operative in the days of Hillel.[1] By the same token, he fails to indicate that the abolition of the *ʿeglah ʿarufah* or of the drinking of the "bitter waters" by the *sotah* were not intended at all as the outright suspension of the

1. See Maimonides *Yad Ḥazakah, Hilkhot Shemitah Ve-yovel* 9:16 and *Kesef Mishneh, ad loc*. See also Yechiel Michel Epstein's *Arukh HaShulḥan, Ḥoshen Mishpat* 67 for an extensive discussion of the subject. It should also be noted that dissenting views which allow for utilization of *prosbul* even at the time when the Biblical law would be operative, based themselves upon the unlimited authority accorded to Rabbinic courts in all matters pertaining to property rights which, however, does not extend to ritual matters.

Biblical laws, but, rather, as enactments that reflected the dictates of the Biblical text as interpreted by the Oral Torah.[2]

To be sure, Rabbi Gordis believes that the qualifications and modifications of Biblical law that resulted from the Tannaim's recourse to the Midrashic method amount to a conscious and deliberate distortion of the Biblical text designed to bring it into line with the Sages' ethical perceptions. It is in this vein that he attributes the restrictive interpretation of the meaning of the double portion to which Biblical law entitled the first born to the Sages' overriding concern for justice and equity. In his view, the Tannaim willfully disregarded other parallel Biblical texts and resorted to sheer casuistry in order to assign a meaning to the text which was more in consonance with their own ethical values and enabled them to protect the right of the disadvantaged. But his suggestion that Midrashic exegesis was merely a subterfuge, intended to conceal under the guise of interpretation what, in effect, amounted to a conscious and deliberate modification of Biblical law, is hardly in keeping with the avowed objectives of the Sages.[3] One finds it rather disconcerting to look upon them as cynical manipulators of the truth engaged in misrepresenting the meaning of Biblical texts. Would it not be far more plausible to take the statements of the Sages at their face value and to acknowledge that they actually believed that by utilizing the method of the Oral Torah they employed procedures grounded in divine revelation and enabling them to elicit the real meaning of the Torah? There is certainly no basis for the charge that a Midrashic interpretation reflected a form of *eisegesis* where the Rabbis read into the text their own extraneously developed ethical notions.

How risky it is to impute to the Sages extraneous motives for their rulings can be seen in Rabbi Gordis' treatment of the practice of *hatra'ah*, the warning which is indispensible whenever capital punishment is to be meted out. He maintains that this provision of the Jewish code is due to the fact that human life is regarded as so sacred that it must not be taken unless the court is convinced beyond a shadow of doubt of the willful character of the crime. But Rabbi Gordis completely overlooks the fact that the same provisions also apply to the penalty of flogging. This being the case, *hatra'ah* derives not so much from considerations pertaining to the sanctity of human life, but, rather, from an attitude to punishment which permits penal sanctions only when the willful nature of the offense has been clearly established. It should also be noted that in the case of *edim zomemin* there is no distinction as to the types of penalty involved, and even the death penalty may be inflicted without prior *hatra'ah*.

Insistence upon the legitimacy of the procedures implied by the Oral Torah is the pivot around which the entire structure of Rabbinic Judaism

2. See Babylonian Talmud *Sotah* 47b for the reasons warranting the discontinuance of the Biblical practices.

3. For a more extensive discussion of the difficulties of this view, see my "The Oral Law and the Conservative Dilemma," TRADITION, 3 (Fall 1960): 82–88.

revolves. Since neither the Sadduccees nor Pauline Christianity accepted this approach, their views were not accorded the status of legitimate dissent. On the other hand, no matter how pronounced the divergences of opinions were between the schools of Hillel and Shammai, or between Rabbi Akiba and Rabbi Yishmael, both sides qualified to be regarded as interpreters of "the words of the living God." Whether a particular opinion can qualify as an authentic halakhic one depends not upon its content, but, rather, upon its conformity to the methodology appropriate for the evolution of legitimate opinions.

There is another important consideration which seems to have been overlooked by Rabbi Gordis in his discussion of how cultural influences penetrate into Halakhah. There is no mention of the severe restrictions which were imposed upon Rabbinic authority at the end of the Tannaitic era. Even the Amoraim could no longer function with the same degree of independence and originality as did the Tannaim. This, incidentally, and not, as Rabbi Gordis puts it, because the possibilities of Midrashic deduction were too limited, accounts for the fact that no significant halakhic Midrashim were developed in the post-Tannaitic era.

The entire system of halakhic jurisprudence rests upon the acknowledgment of a clearly defined hierarchy of religious authority. Later authorities, such as Rishonim or Aḥaronim, cannot disregard the opinions of earlier ones (Tannaim or Amoraim). To suggest the legitimacy of innovations which are adopted without regard to the due process of halakhic decision-making is not an invitation to creative interpretation of the law, but an outright capitulation to the "spirit of the age" which is bound to lead to anomie and, ultimately, to religious anarchy.

What has rendered the Halakhah viable over the ages was precisely the conviction that an eternally valid Torah does not have to be adapted to novel conditions through an infusion of sociology, but that it had to be interpreted in such a fashion as to yield its meaning in the light of prevailing conditions. According to the traditional view, the interpretation of the Oral Torah was not something grafted upon the Written Torah to prevent its obsolescence, but, rather, reflects the dynamic thrust of the Masorah which calls for the creative participation of the Halakhist in ascertaining the meaning of the Torah for his time. It is precisely through the utilization of canons of interpretation which are regarded as an integral part of the Revelation itself that the Halakhist unravels the meaning of the Torah for his time and his "sociology."[4]

4. For a more extensive discussion of the role played by subjective value judgments in halakhic decision-making, see my "Meta-Halakhic Proposition," in *Leo Jung Jubilee Volume*, edited by M. Kasher, Norman Lamm and Leonard Rosenfeld (New York, 1962), pp. 211–221.

Halakhah as an Absolute

J. DAVID BLEICH

THERE IS VERY LITTLE IN ROBERT GORDIS' essay with which I can agree. The Judaism which he describes is not my Judaism; the Halakhah to which he subscribes is not my Halakhah. Most fundamentally, I suspect that the Deity he recognizes is not the God who revealed Himself at Sinai.

Dr. Gordis posits an ongoing tension between Halakhah and the contemporary age and counsels against rigorous opposition to the demands of the latter. Of course, there does exist a tension between Halakhah and the "contemporary age;" there always has been tension between Halakhah and the age in which it found itself and, presumably, there always will be. Long ago, the Sages remarked, "Mizvot were given to Israel solely to purify creatures" (*Vayikra Rabba* 13:3). The midrashic metaphor is chosen with precision. The term "*le-zaref*," meaning "to purify," is the term employed in the Hebrew language to describe the refining or "purification" of precious metals. The Midrash compares the function of *mizvot* to the refining process. The dross is to be purged; only the pure is to remain. The whole may be equal to, or greater than, the sum of its parts. It is certainly not less than the sum of its parts. The deficiencies of individuals are certainly reflected, and in some respects magnified, in society. It is not the function of Halakhah to seek an accommodation with society, but to refine and purify it. The ultimate goal may well be utopian, but that does not release man from the obligation of endeavoring to reach it. Perfection is always elusive, but it is the *telos* which makes excellence a possibility.

Halakhah has never been in conflict with technological, economic or structural advantages of any "contemporary" society. Often it has applauded and harnessed such innovations for its purposes. At times, it has had to accommodate "new external conditions — social, economic, political or cultural" — but always on its own terms and on the basis of its own categories. The application of normative, unchanging legal canons to multifarious situations is not at all a process of "change."

Gordis' use of the Hegelian triad as a paradigm for the halakhic process is unfelicitous. If a philosophical model must be sought for the description of the type of "development" which does take place, it is to be found in the Kantian notion of the synthetic *a priori*. The proposition "7 plus 5 equals 12" is not usually regarded as an empirical generalization. It is a proposition whose truth transcends human experience. Yet, bereft of

J. DAVID BLEICH *is* rosh yeshivah, *Rabbi Isaac Elchanan Theological Seminary and associate professor of law, Benjamin N. Cardozo School of Law.*

a physical universe containing objects grouped in sets, the proposition "7 plus 5 equals 12" would never present itself to the human mind. The experience of separately counting the members of two distinct sets, then recombining both sets and finally counting the members of the resultant new set triggers the intellect and serves as an empirical stimulus for the contemplation of what is essentially an *a priori* truth.

"Even that which a conscientious student will one day teach in the presence of his master was already revealed to Moses at Sinai" (Palestinian Talmud, *Pe'ah* 2:4). All of Halakhah is inherent in the original revelation at Mt. Sinai. Some portions of the Halakhah were fully formulated; others remain latent, awaiting investigation and analysis. Often it is the need of the hour, a specific query or problem which serves as the impetus to discover what has been inherent in the Halakhah from the moment of its inception. The result is not a change or a new construct. It is *a priori* in the sense that it was always present in Torah; it is synthetic only in the sense that it requires a stimulus to prompt the investigation which serves to reveal that which had already been available to the human mind at any time in any age.

Let it be stated unequivocally: *Jewish law does not change* — the "brilliant and dedicated research" of the scholars of the historical school notwithstanding. Louis Ginzberg, himself (as Gordis rightly notes) an acknowledged and renowned exponent of this school, writes, "Great as the achievements of the *Wissenschaft des Judentums* are in all other branches of Jewish learning, it failed in the field of the Talmud — I am using the name in a broad sense including both Talmudic as well as cognate halakhic writings — because its study was superficial and limited to generalities" (*On Jewish Law and Lore*, p. 49).

The tired, shop-worn polemics of the historical school are now again trotted out and paraded as demonstrated facts. For the most part, the "changes" cited represent nothing other than the self-same ancient Halakhah applied in changed circumstances. Let me cite one example — an example of "historical" scholarship so faulty that in no other discipline would it be given serious consideration. The *prosbul* was most emphatically not an abrogation of Torah law. The Gemara, *Gittin* 36a-b, examines the nature of Hillel's innovative method of avoiding the onus of *shmittah* observance and explains that it was predicated upon either of two considerations, each fully consistent with Halakhah: 1) the power of *hefker Bet Din* — roughly analogous to the right of eminent domain; 2) employment of the *prosbul* solely in an era in which observance of *shmittah* is mandated by Rabbinic decree alone. The latter explanation is predicated upon the premise that the Biblical requirements with regard to *shmittah* lapsed with the exile of Israel and were subsequently continued only by virtue of Rabbinic edict. The Sages clearly have the right to temper their own legislation in any way they deem proper.

Those who formulated the "*prosbul* argument" were undoubtedly

aware of this Talmudic statement. How could they justify to themselves such fallacious reasoning? Two possibilities suggest themselves: The simplest method of validating the argument is to dismiss the entire Talmudic discussion as *ex post facto* sophistry. The *takkanah* existed, but some legitimization had to be sought. Viewed in this light, the Sages of the Talmud were — heaven forfend — a band of frauds and charlatans. Alternatively, one might posit the thesis that the Sages were in error with regard to the halakhic process. They "erroneously" believed that Halakhah does not change and, hence, sought justification where none was necessary.

I am not prepared to believe that the Sages of the Talmud were either charlatans or ignoramuses. Since the only Judaism I know is the Judaism which they have bequeathed to me I must either accept it *in toto* or reject it altogether. If they taught that Halakhah does not change I must either accept this principle or reject the halakhic process in its entirety.

The other examples of "change" are equally specious. There was, indeed, a controversy among the *Tanna'im* regarding the permissibility of retaining over the Passover holiday pots which previously had been used for *ḥamez*. We, in our day, without a dissenting voice, accept Rabbi Simeon's view and use such utensils after the holiday. The Talmudic teacher Samuel did, indeed, threaten to proclaim this as the correct view unless the price of earthenware was lowered. We are led to believe that Samuel allowed his halahkic views to be influenced by economic considerations. Some may find such considerations to be humanitarian and praiseworthy, but such a description does not reflect Samuel's stated position. Samuel, *the Talmud itself relates*, fully agreed with Rabbi Simeon's view and had no compunction about using such crockery even if no additional expense was involved. However, he was satisfied to remain silent and not to press for acceptance of his lenient view because he found himself in a locale subject to the jurisdiction of his colleague, Rav, who maintained a stringent, non-normative view. Samuel's conduct was entirely correct. The local authorities had every right to rule in accordance with their convictions and Samuel had no reason to interfere. The honor of the local scholars, respect for judicial authority and common decency all demanded silence. By the same token, the local merchants had no right to engage in exploitation and unconscionable profiteering. The need to prevent such unethical conduct counterbalanced and overcame the need for judicious restraint. Therefore, Samuel threatened to publicize the opposing, lenient view.

There is nothing new or novel in this exposition; it may be found quite readily by consulting *Pesaḥim* 30a. How, then, can one in honesty claim that Samuel is to be counted among those who "did not hesitate to set aside what they understood to be the law of the Torah" for the sake of some "higher" ethic? Let it be noted, without in any way detracting from the character or the personality of Samuel, that there was nothing at all

"morally courageous" with regard to this particular action on his part.

Similarly, Rabban Simeon ben Gamaliel's decree that a woman be required to bring but one pair of birds as a sacrifice after multiple childbirths was not at all an economic device designed to reduce the price of birds. The question to which the Mishnah addresses itself is that of the ritual requirements which enable a woman to partake of the meat of sacrificial offerings *post partum*. The Mishnah states clearly that, while prior to Rabban Simeon ben Gamaliel's decree the sacrifice of pairs of birds equal to the number of childbirths constituted a religious obligation, the offering of but a single sacrifice was even then recognized as being sufficient to permit the mother to partake of sacrificial offerings. In the words of the Mishnah, the mother may "bring one sacrifice and partake of sacrifices and the rest remain a debt." Rabban Simeon ben Gamaliel perceived that, due to the expense involved in purchasing birds, this "debt" was not being discharged. Women, apparently failing to recognize the distinction between the initial sacrifice as a prerequisite for partaking of the meat of sacrifical offerings and the balance which constituted a simple obligation which might be delayed until such time as funds were available, became lax with regard to the basic requirement. As a result, many brought no offering at all, but, nevertheless, proceeded to partake of the meat of other sacrifices. In order to secure compliance with the basic provision of Jewish law and to prevent a transgression carrying with it a grievous penalty, Rabbi Simeon ben Gamaliel counseled that the "debt" should be ignored. This apparently led to meticulous discharge of the basic requirement. Rabban Simeon ben Gamaliel's paramount concern was the prevention of transgression, not fairness in the market place. His concern was entirely "ritual," not "ethical." Since this incident is not at all revelatory of "the ethical sensitivity of the Sages," it certainly cannot serve as a paradigm for making Halakhah subservient to so-called ethical sensitivity.

Gordis' second thesis, *viz.*, that Halakhah is subject to change by virtue of "the need to give recognition to new ethical insights and activity" is not only incorrect, but contradictory to the light in which classical Judaism views ethics. One need but refer to the opening comments of R. Ovadiah Bertinoro in his commentary on the *Ethics of the Fathers* and his characterization of the ethical moment in Judaism as entirely Sinaitic in nature. Halakhah may have sought to accommodate changed "external conditions," but never did it consider the assimilation of the mores or "new ethical insights" of a changed society.

Whether or not Judaism accepts the notion of an ethic distinct from Halakhah has been discussed by Rabbinic scholars and is beyond the scope of the present discussion. It is probably correct to say that, although Judaism does recognize an ethic which does not have the binding force of law in the sense of a discipline incumbent upon all people at all times, nevertheless, even this extra-legal ethic also constitutes an integral part of

Halakhah. Even if it be conceded that there exists an ethic entirely outside the confines of Halakhah, it must be understood that such an ethic is not at all subjective and does not vary in accordance with the changing ethical sensitivity of various societies and historical epochs.

Above all, one cannot read into Jewish teaching presently accepted values simply because they represent *vox populi*, no matter how much they commend themselves to the modern mind. Certainly, they should not be read into the words of Jewish scholars of an age in which those values were unknown. The right of primogeniture is one of the conventions of the law of inheritance. There is no lack of means within Halakhah for circumventing this provision in order to assure that all children share equally in an estate. But the law remains and applies to the division of the material possessions of a person who dies intestate — whether or not such law conforms to contemporary notions of fairness and equality. Most assuredly, the Sages of the Greco-Roman period harbored no such reservations.

It is simply not true that the term *pi sh'nayim* "can only have one meaning." Its literal meaning is "a double portion" not "two parts out of three." The latter involves reading a new meaning into the text. The term means precisely "a double portion" even in Zechariah 13:8: "In the whole land, says the Lord, a double part shall be cut off and perish, and the third shall be left alive." It is far from "obvious" that Elisha does not demand double the Divine Spirit granted to his master. Why should the disciple not wish to excel his master? Why should he modestly demand two-thirds instead of one-half, or one-third, or three-quarters, or some other fraction? No, the literal meaning of II Kings 2:9 is that Elisha begs for a double portion. This is certainly how the passage was understood by rabbinic exegetes.

But legal principles are not based upon exegetic preferences. The Sages had to give firm reason for interpreting a Biblical verse of significant halakhic consequence in one manner rather than another. Accordingly, the discussions in both *Sifrei* and *Baba Batra* show, on the basis of internal textual evidence adduced from the same passage, that this interpretation is, indeed, correct. The passages in II Kings and in Zechariah are passed over in silence not because — heaven forfend — their "clear-cut" meaning is in opposition to the contorted interpretation of the Sages as Gordis contends, but because ambiguity of meaning arises only when reference is made to a division which is tripartite or greater. It is in II Kings and in Zechariah that the meaning of *pi sh'nayim* as "a double portion" is "clear-cut" and requires no elucidation! Are we really to believe that the Sages of the Talmud were not only blatantly dishonest but, moreover, were so foolhardy as not to fear exposure for ignoring the "clear-cut" meaning of a textual passage?

The arguments based upon Rabbinic treatment of the law of the "stubborn and rebellious son" and capital punishment are entirely circu-

lar and best exemplify the unstated premise underlying the thesis as presented: namely, denial of the Sinaitic nature of the Oral Law. If the validity and authority of the Oral Law is accepted, those examples of Rabbinic interpretation cannot be held up as instances of change. Acceptance of a doctrine of "twin fonts of revelation" entails the notion that Scriptural texts, in many cases, are not to be accepted in a literal vein. The Oral Law was received at Sinai simultaneously with the Written Law. Scripture, therefore, means what the Oral Law says it means. Citations of halakhic provisions which are manifestly Oral Law interpretations as evidence of change are cogent only if the Oral Law as the product of Sinaitic revelation is denied. If that is the case — and I believe it is — then Dr. Gordis and I lack a common frame of reference. The author, assuming that he accepts divine authorship of the Written Law, then, properly speaking, shares a common language of discourse with Karaite scholars, among whose numbers I assuredly am not to be counted.

No one has even denied Rabbinic power to promulgate *takkanot* whose effect is to ban that which is Biblically permitted. The prohibition of Rabbenu Gershom against polygamy is one such example. Although medieval Rabbinic authorities were by no means lacking in ethical sensitivity, the pronouncements cited by Gordis were based upon entirely different considerations. While, indeed, various motives have been ascribed to him, it is not generally thought that Rabbenu Gershom was a champion of women's rights. Maharam of Padwa, (responsum no. 14), declares that the considerations were economic in nature, i.e., the financial burden of providing for the progeny of multiple wives was too great for impoverished Jews in the middle ages. R. Jacob Emden, (*She'elat Ya'avez*, II, no. 15), maintains that the *takkanah* is, in truth, the product of Christian influence — but did not reflect acceptance of the heightened moral sensitivity of Christian neighbors. Rather, the *takkanah* was born of the fear of persecution at the hands of monogamous Christians who were offended by what they perceived as immoral behavior. Fear of persecution is quite different from acceptance of a Christian ethic.

A discussion of feminism and Judaism is beyond the scope of this endeavor. Nevertheless, those who correctly decry polygamy ought to be sensitive to the fact that, in antiquity, polygamy as a social institution was designed for the benefit of the female, not of the male. A woman lacking marketable skills was dependent for support and sustenance upon either her father or her husband. Prior to the industrial revolution, women, for the most part, could not earn an independent livelihood. In ancient societies women commonly exceeded men in population figures due to the untimely death of many men as a result of war and accident. In such circumstances some women, of necessity, had to choose either starvation, begging, or polygamous marriage. Polygamy was certainly the most humane of the alternatives. Remember, Judaism never declared plural marriage to be a *mizvah*; it merely permitted the practice. When no longer

necessary for social and economic reasons, the practice of polygamy lapsed among western Jews long before it was formally banned by Rabbenu Gershom.

Gordis' discussion of concubinage is replete with both halakhic and historical errors. Promiscuity, to the extent that it was a problem, was no less a problem among Ashkenazim than among Sefardim, and no less a problem in the 19th century than in the 16th. Even a cursory reading of *She-elat Ya'avez*, II, no. 15, will indicate this to be the case. The halakhic controversy surrounding concubinage is quite independent of the sexual mores of the day. R. Jacob Emden's advocacy of concubinage — a practice which he regarded as halakhically permissible — was motivated by a desire to prevent licentiousness. He sought Rabbinic endorsement of a socially unaccepted but, in his opinion, permissible practice, not a *heter* for the socially accepted but immoral behavior of his contemporaries. An attempt to read into the sanction of concubinage an ecclesiastic *apologia* for an immoral practice that is already rampant is an ill-conceived attempt to read contemporary attitudes and reactions into the pronouncements of Rabbinic luminaries of a by-gone era. The statement: "In the light of their inability to eliminate the practice . . . religious leaders sought to meet the situation by reviving the Biblical concept of the *pilegesh*, the concubine" reflects an "if you can't beat them, join them" attitude which, while mirroring the religious and moral stance of a certain type of contemporary spiritual leadership, was unheard of in classical Judaism.

Vox populi is not *vox dei* and in Judaism the two were never fused. Popular will never served to legitimate breaches of Halakhah, much less to sanction revision of Halakhah. The Karaites of old rejected the Oral Law in favor of the authority of Scripture. The Conservatives of today have rejected the Oral Law in favor of the authority of the popular will. The crucial difference is one of intellectual honesty. The Karaites recognized and conceded that they were, in fact, rejecting the Rabbinic tradition; they did not attempt to cloak themselves in the mantle of the same tradition.

There is really one issue, and one issue only, which is basic to the divergent views regarding the topic under discussion: The sole question is the acceptance or rejection of the eighth of Maimonides' Thirteen Principles of Faith. As expressed so eloquently by the anonymous author of the précis included in the prayerbook:

> I believe with perfect faith that the entire Torah presently found in our hands is that which was given to Moses, our teacher, may he rest in peace.

The crucial phrases are "the entire Torah" and "presently found in our hands." It is clear from Maimonides' comments in his introduction to *Ḥelek* that "the entire Torah" denotes both the Oral and the Written Law. "Presently found in our hands" indicates acceptance of the *masorah*, the authenticity of the halakhic tradition. If the Torah is God-given there is no room for speculation concerning the possibility of human emendation

or change. If it is not, there is no reason why it may not be changed and citation of proof-texts is superfluous. Truth and intellectual honesty are the cornerstones of intellectual inquiry. One does not develop theorems without first postulating axioms. The rejection of axiological principles should not be obfuscated by debate over theorems. A clear and candid statement of what is accepted and what is rejected would not engender a greater degree of agreement than exists at present, but would command a far greater measure of respect.

One final point: There is little reason to restage the ideological battles of the second half of the 19th century. With regard to those issues the sides are clearly drawn. The protagonists are unlikely to be swayed; the spectators are more likely to be confused than enlightened. Yet, at times, a response is necessary, simply so that silence be not misconstrued. More significantly, perhaps some will be prompted to study the original sources. Judaism has always recognized the spiritually curative power of the words of Torah. "The illumination within [Torah] causes them to return to good" (*Eikhah Rabbati*, Introduction: 2). It is most auspicious that, of late, there is a resurgent interest in Torah study. Our great love for each and every Jew prompts the fervent prayer that all our co-religionists be prompted to immerse themselves in the waters of Torah. Only then will differences be dispelled.

Change and Status Quo

DAVID NOVAK

PROFESSOR ROBERT GORDIS HAS ONCE AGAIN demonstrated his wide-ranging scholarship and theological sensitivity in his latest article, "A Dynamic Halakhah: Principles and Procedures of Jewish Law." Any respondent will certainly find here a datum worthy of a thoughtful response. A thoughtful response to this particular article should, I believe, contain three elements: (1) a precise analysis of Prof. Gordis' thesis, (2) speculation as to what specific issue in contemporary Jewish religious life he himself is responding to, (3) some reasons for agreement or disagreement with his thesis, especially in the light of the issue to which he himself seems to be responding in this significant article.

Prof. Gordis begins his article by emphasizing that modern critical Jewish scholarship, from Zunz to the present day, has demonstrated "that the *Halakhah has a history* that reveals the dialectic of continuity and change at every point" (p. 264). The latter part of the article carefully presents a number of examples of this process of change and development, drawn from primary Rabbinic sources. Thus, Prof. Gordis continues in the tradition of the illustrious historians of Judaism whom he cites with reverence. However, this article is much more than a continuation of the attempt to demonstrate the truth of the historicity of Judaism. Rather, Prof. Gordis wants to derive a prescription from this evidence, namely, ". . . Jewish law was never monolithic and unchanged in the past. There are, therefore, no grounds for decreeing that it must be motionless in the present and immovable in the future" (p. 264).

Following the establishment of this fundamental principle, the author proceeds to indicate two principles which have regulated the growth of Jewish law in the past: "one external and the second internal. The first was the necessity to respond to new external conditions . . . the second was the need to give recognition to new ethical insights and attitudes . . ." (p. 267). It would seem that Prof. Gordis regards these two factors, at key points, to be overlapping, because he emphasizes that "the survival of the Jewish people" and "the popular will" (pp. 280-281) are "closely related to the Rabbis' ethical concerns" (p. 280). Now, these two principles certainly are dependent as much on external factors such as economics and politics as they are on internal ethical factors.

The introduction of these regulatory principles is extremely important for Prof. Gordis' thesis, for, although he is arguing for the primacy of change in Jewish law, he is advocating *reasoned change*. As such, Jewish law

DAVID NOVAK *is the rabbi of Congregation Beth El in Norfolk, Virginia and teaches philosophy at Old Dominion University.*

cannot endorse everything simply because it is new. Thus he writes early in the article, "This is not to suggest even remotely that tradition is bound to surrender to the 'spirit of the age.' It is always free, indeed commanded, to examine the demands and insights of each generation and to accept, modify or reject them as it sees fit" (p. 265). Hence these regulatory principles qualify the initial fundamental principle to assert now: *Selective change* is primary in the process of Jewish law. This being the case, change within Jewish tradition has been regulated by objective criteria and *is to be so* in the future. It would seem that these criteria, both internal and external, are subsumed under the category of "life." Therefore, the most absolute statement, both descriptive and prescriptive in intent, which Prof. Gordis makes, is, "Ultimately, however, life is the determining factor and from its decision there is no appeal" (p. 264). The whole point of the article seems to be, then, that "life" has regulated the Halakhah and that the masters of Jewish tradition explicated principles which determined *how* this regulation operated in the past and is to operate in the present and in the future. Furthermore, the primacy of change in the Halakhah as a process is predominately in response to change in the regulatory principles, both external and internal. Thus, Prof. Gordis emphasizes "new external conditions" and "new ethical insights and attitudes" (p. 267). The old is called upon to respond to the new, that is, to change.

What emerges from this developed argument is that *if* there are valid ethical reasons, and *when* there are valid sociological reasons, *then* the exemplars of Jewish tradition *must change* the tradition in response to them. Change is fundamental and those who would resist change cannot do so in the name of "tradition" as a fixed entity whose authority is simply assumed on any specific issue. Those who would advocate resistance to change on any specific issue must justify their resistance on the basis of the very same internal and external criteria which the advocates of change have employed. Since change is, however, the primary fact of the tradition as a process rather than a fixed entity, it would seem that arguments for resisting any specific change must be *better* than arguments for change itself. The burden of proof seems to be, in Prof. Gordis' view, on the former.

Prof. Gordis plays a leading role as a theologian of Conservative Judaism. The question of the ordination of women to the Conservative rabbinate is being hotly debated at all levels of the Conservative Movement and, as is well-known, has deeply divided the faculty of the Jewish Theological Seminary of America of which he is a senior member. Inasmuch as I have had several conversations with him on this issue, I know that he believes that the innovation of ordaining women as Conservative rabbis will not be disruptive of the process of Halakhah. With this in mind, one can see this article of his as a reasoned and learned polemic against those of his fellow Conservative Jews who oppose the ordination of women. This is probably why responses have been called for. If I am

correct, this article raises the level of discussion of this question to the high ideological level where it rightfully belongs.

If we take the implied practical conclusion of Prof. Gordis' article to be an endorsement of the ordination of women, then one can easily see how the article has laid the theoretical groundwork for this conclusion. Halakhah, in general, has changed and the Halakhah concerning the role of women in Judaism has changed in particular. This change has been on the basis of internal ethical factors and external sociological factors. Now, following the main thesis of the article, namely, change is not only a descriptive fact but also a prescriptive value, we can see both an ethical factor and a sociological factor challenging the Halakhah to change concerning restrictions on women functioning as rabbis. The sociological factor is that women in modern society are no longer barred from any profession simply because of their sex. Therefore, the ordination of women must be now included in the halakhic process.

I disagree with both Prof. Gordis' implied practical conclusion and the explicit assumptions upon which it is based. Let this, then, be my *responsum ad rem et ad hominem*. Since my practical halakhic objection to the ordination of women as rabbis has already been published elsewhere,[1] let me confine myself to my disagreement with Prof. Gordis' theory.

One cannot dispute his factual observation that the Halakhah has changed. However, one can certainly dispute the assertion that change is, therefore, a halakhic value. Quite the contrary, one can cite numerous examples in the classical Rabbinic sources to show that the Rabbis regarded change as a necessary, lamentable evil rather than an exemplary good. Like many advocates of the value of change in Judaism, Prof. Gordis cites Hillel's enactment (*taqqanah*) of *prosbul* which enabled the authorities to circumvent the Scriptural law that cancelled all debts every seventh year. However, no less an innovator than the Babylonian Amora, Samuel, — the formulator of the radical principle "the law of the kingdom is the law" (*dina d'malkhuta dina*)[2] — referred to Hillel's enactment as *'ulbana d'dayyanay* — "the arrogance of the judges" and said that if he had the power he would have repealed it and thus returned normative Jewish practice to the original Scriptural law.[3] Furthermore, the Talmud states that Hillel enacted *prosbul* "because he saw that the people were prevented from lending one to another and transgressed what is written in the Torah, 'beware lest there be a despicable thing (*dabar bli'al*) in your heart,' etc."[4] The point in citing this verse, which concludes by denoting this "despicable thing" to be the refusal to lend money to those who need it, is

1. SH'MA, 9.166 (January 19, 1979): 45–47.
2. B. *Baba Batra* 54b. See S. Shilo, *Dina De-Malkhuta Dina* (Jerusalem, 1974), which is the best study of this subject, one which shows just how radical this principle was and the effects that it had on Normative Judaism.
3. B. *Gittin* 36b and Rashi thereon.
4. B. *Gittin* 36a commenting on Deut. 15:9.

that Hillel was forced to choose between two evils, namely, sacrificing the welfare of the poor or sacrificing the obvious meaning of the Scriptural law. His choice of the former was considered to be the best that he could do under these bad circumstances. He reacted, in effect, to a condition of moral regression among the Jewish people. Neither the text nor its treatment by the great medieval halakhists allows it to be a precedent for the theory which affirms change as a halakhic value.

The point is that the burden of proof was never on those who advocated the *status quo* in Halakhah but, rather, on those who advocated change. It was they who had to show convincingly that the changes which they were advocating were required lest more radical changes come about willy nilly.[5] It is clear that any change was considered a regrettable fact of living in an as-yet-unredeemed world. This is a far cry, indeed, from Prof. Gordis' seeming designation of change as the essence of the halakhic process, a point that might be closer to the philosophical position of certain Hegelians than to Rabbinic theology.[6]

One of the great Talmudists of our time (and a scholar who uses a most critical, unorthodox method), and a fellow faculty member of Prof. Gordis, Prof. David Weiss Halivni, recently wrote, in a volume published by the Rabbinical Assembly, ". . . even when the Rabbis altered a law, they never abrogated it. They retained *the integrity of the law*. By integrity I mean partial applicability. They did not totally eliminate the law. It still remained valid and pertinent in an extreme and rare situation. That was necessary in order not to impugn the *Lawgiver* with a lack of moral sensitivity which may undermine not only this law, but laws in general."[7] I cite Prof. Halivni's point because it indicates that the *authority of the Halakhah* which Prof. Gordis considers to be "a basic concept in traditional Judaism" (p. 263) is, in effect, *the authority of God's law*. Despite the fact that God continually responds to changing human situations, and despite the fact that halakhic judgments continually vary, nevertheless, the Law itself was conceived of in Rabbinic theology as a *perpetual and permanent entity*, so much so that, once it was revealed, God Himself bound Himself to its observance.[8] That is why Maimonides made the unchangeability of the Law a dogma of Judaism.[9] Therefore, all change, even necessary, halakhically justified change, was considered to be a deviation from this ideal.[10]

---

5. See, e.g., B. *Sukkah* 36b and *Tos.*, s.v. *kol.*
6. Prof. Gordis attributes the triad: thesis, antithesis, synthesis to Hegel (p. 265). It was actually conceived by Fichte and read into Hegel's philosophy by the English Hegelian, J.M.E. McTaggart. Prof. Walter Kaufmann believes it is not truly indicative of Hegel's position [see *Hegel: A Reinterpretation* (Garden City, N.Y., 1965), pp. 154–162].
7. "Can a Religious Law be Immoral?" in *Perspective on Jews and Judaism: Essays in Honor of Wolfe Kelman* (New York, 1978), pp. 166–167.
8. See especially P. *Rosh Hashanah* 1.3 commenting on Lev. 22:9.
9. See *Hakdamah L'Perek Ḥelek*, nos. 9–10. Cf. Albo, *Iqqarim* III. 14.
10. See, e.g., T. *Sotah* 14.9 and B. *Sanhedrin* 88b.

I do not think that there is any serious student of Halakhah who could possibly deny the empirical fact that halakhic practice has changed in Jewish history.[11] It surely has. The question is, however, *how are we as Normative Jews to understand the meaning of this change from within Judaism*? Discussion on this level is theological, requiring both erudition and sound philosophical method. I disagree with Prof. Gordis' theological position.[12] But I am grateful that his stimulating article has provided a halakhic locus for continuing discourse on one of the truly important questions of Jewish existence.

11. For an analysis of Orthodox halakhic innovations, see Alan Yuter, "Meḥiẓah, Midrash and Modernity: A Study in Religious Rhetoric," JUDAISM 28.2 (Spring, 1979): 147–159.
12. Some critics might attempt to see Prof. Gordis' argument as an example of the so-called "modal fallacy", viz., an unjustified conclusion of "oughtness" from "isness" (i.e., "change is, therefore it must be"). However, this is not so, because his descriptive statements are about a *normative continuum*, which already contains prescriptions which themselves call for future applications. This point is developed in my article, "Judaism and Contemporary Bio-Ethics" soon to appear in a special issue of the *Journal of Medicine and Philosophy* devoted to religious ethics.

The Struggle for Change

BEN ZION BOKSER

WE ARE ALL INDEBTED TO DR. GORDIS FOR his splendid summation of the historical developments which underlie the structure of the Halakhah as it has come down to us from the past. Too often the Halakhah is envisioned as an amalgam of divine revelations shaped by divinely inspired sages who formulated the final pattern which Jewish religious life is to assume for all time to come. No matter how wide the gap between the claims of life and the traditional form of Halakhah, we have been advised that it is life that must bend while Halakhah must remain inviolate in its time-hallowed form. It is this rigidity which has actually served to alienate large numbers of our people from tradition and they have embraced either a secular philosophy or a religious ideology which dispenses with Halakhah altogether. Dr. Gordis has shown that Halakhah, in its classical Rabbinic period, was open to development and did, in fact, respond to the pressure for change which was released by the historical realities during its various stages of development.

But it might be helpful to note that these changes did not take place without an intense struggle. The development of Halakhah, like developments in all legal systems, proceeds through a dialectic in which strict constructionists or traditionalists confront, and are often locked in bitter struggle with, the advocates of change. The Shammaites were pitted in struggle against the Hillelites. Rabbi Eliezer ben Hyrcanus resisted every effort to modify the law and he was finally excommunicated from the academy for his obstructive tactics. The practical elimination of capital punishment was protested by Rabban Simeon ben Gamaliel who felt that, without it as a deterrent, violent crime would be increased (M. *Makkot* 1:10). Rabban Johanan ben Zaccai's reforms after the destruction of the Temple were put over by ignoring the Sanhedrin, without allowing that body to vote, because he was afraid that the vote might go against the changes (*Rosh Hashanah* 29b).

It should be noted, too, that not every conflict between morality and the law was resolved by the Rabbis. In the case of a *mamzer*, the "bastard," as the child born of an illicit relationship between a man and a married woman was called, the old law remained intact, presumably because it was too deeply entrenched in the psyche of the people. A bastard was restricted to marrying another bastard, or a convert or a liberated slave, but he could not marry a person of normal status in the Jewish community. A Rabbinic text records dismay at the inequity involved, but the law has remained unchanged to this day.

BEN ZION BOKSER *is rabbi of The Forest Hills Jewish Center and adjunct professor at Queens College.*

The moral sensitivity expressed in this text, and the dismay at the passivity of the Rabbis in not redressing the inequity are striking, and we cite the text in full. The comment is based on a verse in Ecclesiastes: "But I returned and saw all the oppressions that are done under the sun; and behold the tears of the oppressed, and they have no comforter; and on the side of the oppressors there was power, but they had none to comfort them" (Ecc. 4:1). "Daniel Hayyata applied this verse to bastards. 'And behold the tears of the oppressed.' If the parents of these bastards committed transgression why should it affect these poor sufferers? . . . 'But on the side of the oppressors there was power.' This applies to Israel's great Sanhedrin that came against them with the authority of the Torah and removed them from the community, because it is written: 'A bastard shall not enter the community of the Lord' (Deut. 2:3). 'But they had none to comfort them.' Said the Holy One, praised be He: It is for Me to comfort them." (Leviticus *Rabbah* 32:8). Elsewhere we have a ruling by Rabbi Jose which won the support of his colleagues that the disabilities of the bastard will be eliminated in the hereafter (*Kiddushin* 72b).

One of the factors which impedes the advocacy for change in our own time is the fact that many of the progressive elements who most keenly feel the need for change have seceded altogether from the halakhic community. Some have joined the camp of the secularists, while others have embraced religious ideologies which have renounced the authority of Halakhah. The result has been that the custodians of Halakhah have come largely from the circles of extremists who are so rooted in the past that they persist in ignoring the claims of the present.

To the extent that our religious leadership will act on the broader vistas of Halakhah and activate its true nature as a body of norms through which to hallow life in all its diverse manifestations, a tragic distortion of Halakhah will be removed. And as Halakhah regains its true historic character, which includes, above all, its responsiveness to life, we shall be able to win those who have strayed back into the fold of a Halakhah respecting and Halakhah-observing community.

The Talmud as the Final Authority

LOUIS JACOBS

PROFESSOR GORDIS' BRILLIANT ANALYSIS has placed heavily in his debt all who are concerned with the problem of how to achieve a viable Halakhah. It is a privilege to have been invited to comment on this stimulating essay.

The unease I feel about the essay stems from the author's very strong reliance on "Talmudic" (i.e., halakhic Midrashim, Mishnah, Tosefta and Gemara) sources in order to demonstrate the correctness of his thesis regarding the dynamism of the Halakhah. I would maintain that the Talmud, far from serving as a guide to the solution, is itself the main cause of the problem, both because of the nature of the Talmudic material and because of the attitudes of the post-Talmudic Halakhists towards it.

First, the nature of the Talmudic material. The Babylonian Talmud, the major source for the inquiry, especially but not exclusively, is largely a work of purely academic theory and argumentation, far removed from any considerations of "the . . . adjustment of law to life" (the title of Solomon Zucrow's well-known work [Boston, 1928], which, for all its inadequacies, and they are many, deserves a mention as a pioneering effort). Even if it is hyper-critical to question, for instance, whether Hillel really did introduce the *prosbul*, the sobering fact remains that the account of the techniques he used is, at least in the Babylonian Talmud, second or third hand reportage[1] and reportage, moreover, not for itself or to provide accurate information about the past but mainly with the aim of contributing some of the bricks and mortar for the Talmudic construction (the *binyan* of the *sugya*). *Gittin* 36b, for example, on the legitimacy of Hillel's *prosbul*, is hardly interested at all in Hillel's *takkanah* per se, but in the general principle of whether the Sages can set aside a law of the Torah and, if they can, by means of which machinery, and even this not as a severely practical problem but as an academic exercise in the dialectic so typical of the Amoraic understanding of what it means to "labor in the Torah." Again, the Babylonian Talmud is a contrived work, using such things as literary device for the sake of aesthetic effect.[2] Shamma Friedman[3] has called attention to the use of "sacred" numbers in the Bavli, arguments being presented in threes or sevens so that a *sugya* is often

1. Jacob Neusner, *The Rabbinic Tradition About the Pharisees* (Leiden, 1971), Vol. III, pp. 320–368.
2. See my *Studies in Talmudic Logic and Methodology*, Part II, pp. 53f.
3. Shamma Friedman, *"Mivneh Sifruti be-Sugyot ha-Bavli," Proceedings*, World Congress of Jewish Studies, Vol. III, (Jerusalem, 1977), pp. 389–402.

LOUIS JACOBS *is rabbi of the New London Synogogue, London, England.*

structured almost like a poem. It is also worth noting that, when a series of conclusions are said to be derived from a Mishnah or a Baraita, the formula is always "three things can be proven from this",[4] never "two" or "four" or "five." How can it be possible for three and only three conclusions to be extracted from the Tannaitic source in every instance, unless it is all an academic, literary exercise rather than any real attempt to obtain guidance for the conduct of life? In the light of this it is as precarious to derive principles and procedures for the dynamics of the Halakhah from the Talmud as it would be to try to obtain information about Danish Court life in the past from *Hamlet*.

Though the Babylonian Talmud is not our only source, yet, even in the Bavli, for all the caution that has to be exercised in drawing wide conclusions for the reasons stated, the concept of dynamism in the Halakhah is certainly alluded to, so that there is no cause to invalidate Gordis' basic contention. But this leads to the major factor operating against the dynamic principle — the acceptance, by all the post-Talmudic Halakhists, of the Talmud as the final Court of Appeal.[5] I.H. Weiss, in his famous chapter: "Did the Post-Talmudic Authorities Add To or Diminish From the Talmud?"[6] adduces much evidence that Maimonides himself (the author of the maxim that there can be neither addition to, nor subtraction from, the Talmud) and many others were not entirely bound in practice by the decisions of the Talmud. But, in theory, the Talmud was sacrosanct, any deviations from its rulings requiring the justification that had the Talmudic Rabbis been confronted with the new situation that was demanding changes they would have legislated accordingly and so we can, as it were, do it on their behalf. Yes, as Gordis shows, the Halakhah still managed to retain its dynamism, even in the post-Talmudic period, and yes, changes were made in response to ethical and social demands, but the theory — that the Talmudic Rabbis, *Ḥazal*, are infallible authorities in all matters of Halakhah (eventually, in some circles, in all other matters as well) — acted as a built-in check against any conscious attempt at departing from any ruling accepted by the Talmud. No traditional Halakhist ever dared to declare openly that the Talmud is wrong on this or that point of law. There is sufficient evidence that the Halakhists strove mightily, say, to alleviate the sufferings of innocents by using all their legal ingenuity to prevent the stigma of *mamzerut* from becoming attached to persons where this could be done by invalidating a first marriage and the like. What none of them ever thought of doing was consciously to pronounce that the Talmudic understanding of the Deuteronomic law, still less the Deuteronomic law itself, was based on an inferior notion of transmitted guilt or the taint of it and should be abolished. Modern

4. *shema minah telat*, e.g., in *Berakhot* 27a; *Pesahim* 5b; *Yevamot* 46b; *Avodah Zarah* 43a.
5. See Boas Cohn, *Kunteros ha-Teshuvot* (Budapest, 1930), pp. 18–25. We need not here go into the question of which is the more authoritative, the *Bavli* or the *Yerushalmi* (See *Yad Malakhi, Kelalei Shnei ha-Talmudim*, No. 2 for the sources.
6. I.H. Weiss, *Dor Dor ve-Dor'shav*, Vol. III, chapter 18, pp. 216–230.

scholarship has, indeed, uncovered the dynamics of the Halakhah, but, by the same token of scholarly integrity, we are forced to acknowledge that the halakhic process, from the close of the Talmud down to the present day, is, paradoxically, one in which change takes place in a theoretically unchanging system. The reality of change is ever denied by the brave assertion that nothing has changed or can ever be changed. It is true that this is the method adopted in every legal system in order to reconcile the two conflicting ideals of legal flexibility and legal continuity. But with regard to the Halakhah, resistance to change is not only due to the need for legal stability, but is also based on a most powerful religious dogma, that the Word of God is unchanging and His Law immutable, this Word and this Law being mediated through the Talmudic Sages and through no others.

Schechter's idea that it is Catholic Israel which determines the Halakhah has been of much help, as has been Gordis' elaboration elsewhere of the concept that Catholic Israel is to be identified with the ranks of those faithful to the Halakhah. The difficulty here is that, for all the post-Talmudic Halakhists, the only Catholic Israel to have a vote, or even a voice, is that of the ancient community whose representatives, leaders and guides are the Tannaim and Amoraim. To put all this in other words, Gordis' argument (cogent and entirely acceptable in its main thrust) is based, as he remarks, on the findings of modern scholarship. But the picture which emerges from the massive researches of modern scholars is quite different from that painted by the fundamentalists who categorically reject the whole notion of development. But, and there's the rub, the traditional Halakhah *is* based on fundamentalism, if not of the Bible certainly of the Talmud. According to this view, the Torah, when it says: "A *mamzer* shall not enter into the assembly of the Lord" (Deut. 23:3) really means, as the Talmudic Sages unanimously say it does, that the offspring of an adulterous union may never marry. It is no use a modern Biblical scholar, or Abraham Ibn Ezra, telling us that this is not the plain meaning, but that the reference is to a tribe, or, at the most, he may suggest such an interpretation in his role of commentator, but he must never allow it to be used for the purposes of the Halakhah. If he were to do so he would be guilty of denying that the Torah is from Heaven. This attitude, shared by all the Halakhists, is at the heart of the problem. The non-fundamentalist Halakhist today agrees with the halakhic conclusion, as traditionally conceived, but cannot agree with its premises. Not that he necessarily rejects the doctrine of *Torah min ha-shamayim*, but, seeing this doctrine in dynamic terms and stressing the human element in the divine message, he finds it increasingly irritating when all the post-Talmudic Halakhists who are, after all, his heroes and his authorities in Halakhah, always seem to base their decisions, ultimately, on the doctrine conceived of in completely static terms. Fifteen hundred years of halakhic activity cannot readily be swept aside in an approach which purports to follow the

normative processes of traditional Judaism and, even if it were, there would remain the problems raised by Biblical scholarship regarding the original meaning and background of the law.

I do not know the answer (though, together with distinguished colleagues, I have tried to point to one). But, like so many others who are non-fundamentalist in outlook and yet totally committed to the halakhic way, I would like to have an answer. Adapting the saying of R. Johanan (*Eruv.* 27b), if someone will be good enough to provide the answer I will gladly take his change of garments to the bathhouse for him. Perhaps at this stage of the investigation the thing to be done first, and above all others, is to encourage the mood, rather than to seek to provide all the answers. Gordis, in his essay and in his other writings, shows how the mood is to be cultivated.

She Turns Nevertheless

BERNHARD FRANK

And the angel said to Lot: "Flee for your life;
do not look back . . . lest you be consumed."

She turns nevertheless
to face head on
the brimstone
on her native plain

Fire lapping at the
curdling grain
(cow & heifer
spinning
in one flame)

Already the blackened town,
a toothless beggar's mouth,
yawns in the morning sun

Nothing — husband tugging
at her arm, the whim-
per of her nursling son —
shall unrivet her now.

When the print of memory
flashes, time & again,
across her glistening brow

Tears coalesce
in her calcified pupils nevertheless.

Let Jewish Law Move Again

SEYMOUR SIEGEL

WE ARE GRATEFUL TO PROF. GORDIS FOR A lucid and learned discussion of the dynamics of Jewish Law. It will serve, I hope, to counter the view that Jewish law is a self-contained, *a priori* system, unaffected by history or by external forces. Those who hold this viewpoint believe that the strength of the Jewish legal tradition lies in its power to reject any novelty. This approach is epitomized by the pun on the law that new grain must not be eaten until after the second day of Passover (*ḥadash assur min ha-Torah*). The phrase is interpreted to mean that anything new (*ḥadash*) is prohibited by the Torah. Prof. Gordis' essay is a refutation of the idea of the *unchangeability* of Jewish law, of its splendid isolation from intellectual and cultural trends current in the world outside. The history of Judaism shows that the evolution of Jewish norms is the product of interaction between the internal and external forces.

His essay will, I hope, help to refute the notion that contemporary Judaism ought to adjust to the fact that we are in a *post-halakhic age*, that to speak at all of Jewish *law* is hopelessly outmoded. Judaism incorporated the best of ethical and intellectual trends and made them serve in the evolution of Jewish law. It never abandoned the idea that, in the Jewish view, the religious life is formed, at least in its minimum expression, by structure, predictability — that is, law.

Judaism is neither static nor merely imitative of what is happening at the time. Judaism changes. It reckons with the outside world. However, these changes are made *within* the legal tradition, without jettisoning the essential character of Judaism. The ability to change does not mean surrender. It is, rather, a strategy against irrelevance.

What is now important is to draw the proper lessons from Dr. Gordis' analysis of the history of Jewish law. This will involve the release of the inner powers inherent in the Tradition to make necessary revisions in the light of contemporary developments. What was done in the past should make us less timid and cautious to do what has to be done.

First and foremost, Jewish family law requires modification. The patriarchal structure which it assumed is hardly possible to sustain in our times. The police authority of Jewish courts is no longer available, even in Israel. The most pressing area is Jewish divorce law. Since, under traditional norms, the consent of the husband is indispensable for the issuance

---

SEYMOUR SIEGEL *is professor of ethics and theology at The Jewish Theological Seminary of America and Chairman, Committee on Jewish Law and Standards of The Rabbinical Assembly.*

of a *get*, it is possible for unscrupulous husbands to use blackmail and worse. In some sectors of halakhic Judaism, noteably in the Conservative movement, the power vested in the rabbis to annul marriages if the husband acts unethically has been invoked. It is hoped that other groups within traditional Judaism will do likewise.

There is also a pressing need to modify the notion inherent in traditional Halakhah that marriage involves the husband *taking* the wife. There is little expression of the mutuality understood in today's world. There is a need to modify the traditional *ketubah* to reflect the reciprocal relationship between husband and wife. The language of the document should also be changed to Hebrew rather than the Aramaic which is now used.

The whole area of women's rights and access to religious expression within Judaism requires reconsideration. The status of women in society has radically changed in our time. The role of women in communal life, which is reflected in much of traditional Jewish law, does not reflect our ethical notions. The fourteenth century authority, Abudraham, in his classical commentary on the *Siddur*, suggests that women are free from the observance of time-bound mizvot because they are "under the subjection of their husbands." Therefore, their time is not their own. Whatever value this view may have had in the past, it can hardly be defended today. For too long, Judaism has deprived itself of the intellectual and spiritual gifts of women. There can be, of course, legitimate differences of opinion concerning the speed and extent of the needed modifications. There should be no difference of opinion concerning the necessity to change the *status quo*.

The Jewish calendar needs rethinking. I do not refer merely to the perennial problem of whether it is good Halakhah or good policy to retain the second day of the holidays. I refer to the need for new days in the liturgical calendar to reflect the tragedy of the Holocaust and the founding of the State of Israel. These new days should be on a par with those feasts and fasts already part of the calendar. The liturgy of the Synagogue ought to reflect the new realities of Jewish existence — the terrible tragedy of destruction and the joy of sovereignty.

We have not made much use of the discoveries of science in renewing Jewish law. Many laws of *kashrut* are based on certain assumptions: for example, that earthenware dishes absorb taste which cannot be purged. These assumptions ought to be scientifically investigated. So, too, food additives and chemicals. Are these substances in any way similar to the tissues from which they come? Are they not in the category of *davar ḥadash*, a new thing and, therefore, not to be judged as either *milchig* or *fleishig*? The new discoveries of biological and medical science require halakhic creativity. Do we have to use the same criteria of death as were used before the discovery of brain waves? Can we be so adamant about

autopsies in an age of rapid communication and dramatic medical breakthroughs?

Most important of all, we must apply the ethical notions within the Halakhah with more boldness and imagination. Is meat really kosher when its price is unconscionably high? Or when there is suspicion that underworld elements are involved in the meat industry? What about our business practices and the regulations of governments? Are they in line with halakhic norms? The *Shulḥan Arukh* covers all aspects of life — ritual, ethical, commerical, and sexual. A renaissance of halakhic Judaism will require an application of Jewish legal norms to the entire realm of contemporary concern.

All of the above, and much more, is implied in Dr. Gordis' essay. There has been, in recent years, some progress in the stimulation of Jewish legal creativity. I hope that it will not sound too self-serving to point out that in the Conservative movement some of the issues which I mentioned have been dealt with. We may have been wrong. But we were not inactive. It is one of the great tragedies of contemporary Jewish life that all of the sectors of Judaism that are interested in Jewish law do not work together in the solution of common problems. Instead, we see a widening of the gap between groups. Superficial and, ultimately, unimportant distinctions and differences are stressed, instead of the wide areas of agreement. It is hoped that essays such as that of Prof. Gordis will bring together all the groups dedicated to a dynamic, living Halakhah.

Halakhah and History

JACOB NEUSNER

THE THESIS THAT SOCIAL CONDITIONS FORM a consideration in the unfolding of Jewish law would not have surprised those rabbis of antiquity — I restrict my discussion to the ones represented in Mishnah-Tosefta — who, as Rabbi Gordis rightly argues, record *taqqanot* and articulately deal with problems presented by everyday life, and who, I shall argue, responded to the historical crisis of the disasters of 70 and 135 C.E. by creating Mishnah itself. Orthodox scholars and rabbis today, moreover, have no difficulty whatsoever in conceding that the Halakhah was, and remains, a living and unfolding system. Whether or not the specific points of change adduced at the end of Rabbi Gordis' fine statement of the theology of Conservative Judaism form an apt parallel to the *taqqanot* of first and second century authorities, and whether or not the formation of Conservative Judaism by Rabbi Gordis' generation runs parallel to the creation of Mishnah, are, of course, not historical or scholarly questions at all. They are questions of judgment and faith. All of the facts of history together will not settle them. For the past, as past, bears no authority, except in historicism. And the logic of historicism — events bear authority and impose judgments of wrong and right — is not compelling any more.

Rabbi Gordis wisely wishes to focus upon the "dynamics" of Halakhah, with the idea that if we may find out how the law of Judaism takes shape and unfolds, we may discover for ourselves a place in that same process. For that purpose, however, it is urgent to take up the history of Halakhah stage by stage, document by document. It seems to me prudent to deal with a given stage, a single constituent of the halakhic canon, rather than to generalize from the whole about the whole, to speak of "*the* Halakhah" and "*its* processes." For if that is our procedure, we posit a unitary history which is no history, a single legal corpus, essentially lacking all traits of historical and social development. If it is axiomatic, as Rabbi Gordis rightly stresses, that "sociology" forms part of the halakhic process of making decisions, then that process, of which "sociology" forms part, has itself to be described in all of its other parts and constituents, in its functioning in specific times and places. In other words, historicism without accurate and up-to-date history will not advance the analysis of the problems that Rabbi Gordis wishes to treat. And history means detail, not generality.

If, therefore, we ask whether Mishnah, for its part, takes shape as a

JACOB NEUSNER *is University Professor, professor of religious studies, and The Ungerleider Distinguished Scholar of Judaic studies at Brown University.*

whole, not merely in some trivial detail, in response to the "radically changing social, economic, and political conditions" of the Hellenistic Roman world, the answer is ambiguous. On the one hand, it is unthinkable that anything done in the aftermath of the destruction of the Temple in 70 C.E. and the failed revolt of 135 C.E. should ignore these events. So in our interpretation of the Mishnah as a whole, as a system in itself, we have to invoke these events. On the other hand, when we turn to the system of Mishnah and examine as best we can its history in detail, the picture is quite different.[1]

First, as to the origins of its laws, Mishnah comes forth as a fully articulated system, resting on its own authority, not on that of Scripture. As we all know, Rabbi Judah the Patriarch (henceforward: Rabbi) is remarkably uninterested in the exegetical foundations of the laws of Mishnah. The document is presented in descriptive, present-tense language, so portraying how things are in general, not how they were at some one time, let alone whence they originated. Mishnah is a profoundly anti-historical, anti-contextual document.[2] Indeed, on these very grounds, Mishnah provokes the criticism represented by Sifra,[3] which cites Mishnah verbatim and then proves that a proposition of Mishnah, not founded on exegesis, is helpless, and, as it must follow, that it is only through exegesis that the rules of Mishnah may be proved beyond doubt to be valid. The great critique of Mishnah represented on nearly every page of the Talmud — "What is the source of this rule? As it is taught *in Scripture* . . ." — shows that those who received Mishnah wished to give it a history in Scripture and in the exegesis of Scripture which Rabbi, for his part, proposed to ignore.[4]

Second, and of much greater importance, when we trace the unfolding of the law of a tractate of Mishnah and of a whole division, time and again what we find is that the events of the day play no role in the

---

1. I have now completed this work in my *History of the Mishnaic Law of Purities* (Leiden, 1974–1977), I–XXII; *History of the Mishnaic Law of Holy Things* (Leiden, 1978–1979), I–VI; *History of the Mishnaic Law of Women* (Leiden, in press for 1980), I–V; *History of the Mishnaic Law of Appointed Times* (Leiden, in press for 1981), I–V; and *History of the Mishnaic Law of Damages* (Leiden, in press for 1982), I–V. None of the twenty-eight volumes of my *History* now in print has been reviewed in this journal, but all have been extensively reviewed elsewhere.

2. This is spelled out in my "Transcendence and Worship through Learning: The Religious World View of Mishnah," *Journal of Reform Judaism*, (Spring, 1978): 15–29.

3. I have worked this proposition out for nearly twenty percent of *Sifra* in my *Purities* VII. *Negaim. Sifra* (Leiden, 1976).

4. In point of fact, the relationship of Mishnah to Scripture — that is, of Oral to Written Torah — is exceedingly complicated. I have spelled out my main results to date in these articles, "From Scripture to Mishnah: The Case of Niddah," *Journal of Jewish Studies*, 29, 2 (1978): 135–148; "From Scripture to Mishnah: The Exegetical Origins of *Maddaf*," *Fiftieth Anniversary Festschrift of the American Academy for Jewish Research* (in press); "From Scripture to Mishnah: The Origins of Mishnah's Division of Women," *Journal of Jewish Studies*, 30, 2 (1979): 138–153; and "From Scripture to Mishnah: The Origins of Mishnah's Fifth Division," *Journal of Biblical Literature*, 98, 2 (1979): 269–283.

important shifts and radical turns of the law.[5] On the contrary, I have found it surprising that in no way are the issues of the law after Bar Kokhba's war fresh and unpredictable. Where the unfolding of a tractate begins with the authorities of 70 to 130 C.E., the period from the destruction of the Temple to Bar Kokhba, there is in their successors' stratum of the law a close fit and complete continuity. Questions asked earlier produce fresh answers. Distinctions implied earlier are drawn out and explored. In other words, the law embodies and expresses an inner logical structure: *The law inexorably and ahistorically unfolds as an expression and articulation of its own deep structure of logic.*

The oldest system of Mishnah, which is that of the division of purities, appears to me to go back to the period before the turn of the first century. It, too, undergoes significant development down into the generation after Bar Kokhba, something like two centuries of "history." Yet, as I traced that history, I could find no point at which the events of the day could be shown to have intervened in the process of the law's logical unfolding. On the contrary, events appear to have no affect upon the law at all. Indeed, facing the authorities after 70 C.E. are precisely those problems left open for further analysis and articulation by the legal philosophers of the period before the destruction of the Temple. Since it was the Temple which supplied the generative problematic for the laws of purity — for, to begin with, one had to be cultically clean in order to go to the Temple, for instance, on a festival — the fact that the Temple's destruction raises no new issues but only underlines the continuity of the old ones is striking.

Now, in support of Rabbi Gordis' thesis, one may well conclude that the very continuity of logical thought itself constitutes a powerful response to history, indeed a judgment upon events. I think that that is so. It appears to me that the entire system of Holy Things, for example, is the work of authorities who thereby impose their defiant judgment upon what had happened. By insisting on the continued authority of the ancient laws of Scripture, which they repeat and extend without significant divergence, and which the division of Holy Things essentially serves to instantiate and articulate, they take a position in the face of choices. While others proposed either to abandon the conception of sacrifice all together, on the one side, or so to spiritualize sacrifice and cult as to deprive them of all concrete meaning,[7] on the other, the rabbis of the second century chose

5. This briefly states the conclusions of my *Purities* XXII. *The Mishnaic System of Uncleanness. Its Context and System; Holy Things* VI. *The Mishnaic System of Sacrifice and Sanctuary*; and *Women* V. *The Mishnaic System of Women*. It is in *Purities* XXII that the matter is worked out in the greatest detail through the longest sequence of historical generations. I am inclined to suppose that the division of Holy Things is produced in a shorter time-span; Women, for its part, as a system seems to me the work of the authorities only after Bar Kokhba, although it draws upon information — facts and rules — going back for a very long time indeed.

6. I have briefly summarized this matter in "Map without Territory," *History of Religions*, November, 1979.

7. Both alternatives are worked out in earlier Christian theology; see my *Holy Things* VI, pp. 35–48. The one thing that the authorities of Mishnah omit is a division, or even a tractate,

a third way. They repeat and augment the Scriptural laws and apply their logic. They also make certain that, for the time being, there will be no other cult and sacrificial system.[8] And they affirm that what was, will be again, an act of supreme faith against all the evidence of the hour. So, as Rabbi Gordis rightly argues, this would be an example of the place of social reality in the formation of the law.

But in the detail of the law of both Purities and Holy Things I do not discern a single important conception or consideration adduced from, or clearly responsive to, the circumstance or the hour. So, if I may borrow Rabbi Gordis' excellent distinction, the social setting defines the conditions under which the law will take shape. But the law finds its shape in accord with its inner logical structure. That is, to repeat, that structure unfolds along lines laid out from within. Merely proving that the law changes as times change does not really get at the critical issue, which is the analysis of the generative problematic of the system. We have to locate the circumstances in which, at each point in its unfolding, the legal system of Judaism takes shape, and further isolate and interpret the specific exegesis constituted by the Halakhah's own exegesis of the life of the Jewish people.[9] Only now is this under way.

Third, if Mishnah be taken as symbolic of the whole of the halakhic system, then I think that the essential character of the system is misunderstood if we do not attend to its own perspective on itself. Mishnah does not see itself as a historical and cultural entity, alone or in the main. Mishnah's internal evidence is of a system which hardly concedes itself to be tied to, or part of, history, let alone a creation of a particular society. In fact, it is as a historical document that Mishnah stands in judgment on the history of the Jewish people and presents its own, at that time hardly realized, conception of the society of Israel. It speaks of a world to come into being, not of an age passing out of reality. Mishnah's system is a transitional one. It preserves interests and themes important to the priests, doing so through the methods and literary and cultural prefer-

devoted to the priesthood. In two other Israelite systems, that of Leviticus, going back nearly six centuries, and that of the Letter to the Hebrews, of the preceding century, the constituents of a system of sacrifice and sanctuary are three: the priesthood, the cult, and the sacrifice itself. Mishnah's system is rich in discussion of laws of the cult, including the upkeep of the Temple, and of the sacrifice itself. While it contains a fair number of rules relating to the priesthood, these are not definitive of a major division of the Mishnaic canon. The polemic involved here is fully expressed by Mishnah itself, e.g., M. *Eduyot* 8:6. This would seem to me another way in which social considerations play a role in the formation and the statement of the law, in support of Rabbi Gordis' basic thesis. In this regard, what the canon omits, or treats in a decidedly subordinated context, is an act of legislation, as much as what the canon says. The modern parallel is *Todschweigen*, killing by silence the scholarship that one cannot disaprove but one does not like, or, rather, by silence in print.

8. This is clearly an option which is articulately rejected both by the law, e.g., M. *Zebahim* Chapter Fourteen, and, also, by the second century sages' own history of the law, made up after 135 C.E., for which see my *Rabbinic Traditions about the Pharisees before 70* (Leiden, 1971, I–III), III, pp. 239–300.

9. I have spelled out this position in my *Method and Meaning in Ancient Judaism* (Missoula: Scholars Press for Brown Judaic Studies, 1979), pp. 101–132.

ences of the scribes (e.g., for *Listenwissenschaft* and acute linguistic formalization). But with methods borrowed from scribes and laws important to priests and cult, Mishnah chooses to make its own statement.

For, in the nature of things, priests speak of a single place, namely, the Temple. There the world is contained and symbolized, sustained and given its pivot. Priests offer a world which is cosmological and wholly locative. But Mishnah's own history proves its creators' intent, which is to speak not to place but to community, to address the life of Israel. Mishnah, therefore, is a document expressive not of cosmology (of which Mishnah offers virtually nothing) but of anthropology. Mishnah forms a system which, by its nature, is to be realized not only in some one place, but everywhere. It is, thus, a utopian, not a locative, construction.

In this remarkable shift, effected by Mishnah through Halakhah, Mishnah reshaped those forms of Judaism out of which it had emerged and the materials which it accurately and faithfully used with such powerful and lasting effect of reform. In its movement from cosmology and location to anthropology and utopia, Mishnah remakes the Israelite world, even while restating its most ancient traits. This fact would provide a viable, indeed an evocative, model for the theology which Rabbi Gordis wishes to advance. That is, the Halakhah represented by the Mishnaic system supports the proposition that, in a measure, Halakhah responds to the social and historical situation of the Jewish people. But whether this rapid account of Mishnah as a document of history and a force for the reshaping of Israelite society provides materials parallel to, let alone probative of, the Conservative Jewish position on mixed seating or on riding to synagogue on the Sabbath as a halakhic proposition I cannot say. To me it seems there is a certain dissonance and, in any case, no one can doubt the disproportion.

Still, in Rabbi Gordis' defense it must be said that he has phrased the issue for public discussion in a responsible and careful way. He allows us to see Conservative Jewish theology in all of its fullness, its mode of reliance on historical facts of its day, its specification of what it conceives to be the meaning of those facts, its lucid account of how it turns those facts to its own account. For my part, I do not think that most of the historical facts pertaining to the period of my own specialization are historically very factual. But that is why, all the more, I appreciate his invitation to respond to his thoughtful and illuminating statement on Conservative Judaism, even though, as is obvious, the results of my own studies hardly give much comfort to the specific positions of Conservative historian-theologians of the past and passing generation.

A Theological Foundation for the Halakhah

JACOB B. AGUS

MY CONTRIBUTION TO THIS SYMPOSIUM ON Halakhah is a brief summation of views and ideas expressed in detail in other books and articles.[1] A philosophy of Halakhah is an integral portion of one's world-view in general. At least, it is so in my case. I beg the reader's indulgence for the outline form of exposition, which necessarily raises more questions than it answers.

God

I believe in God as the Ultimate Reality of the Cosmos, the unifying and harmonizing Principle of existence. The philosophic school which most nearly reflects my views is that of *panentheism*, where the cosmos is viewed as being *in* God. I consider that this school represents the "perennial philosophy" at which Aristotle and Maimonides aimed; Bergson reconciled it with the data of evolution; Alexander and Whitehead described it as "organismic" and Hartshorne defended it in contemporary thought. The cosmos contains a crescendo of "wholes," structured clusters of energy which function as if they were unitary beings. In the course of evolution, ever more elaborate organisms have evolved, with mankind representing the emergence of free personalities, capable of sensing the divine principle of organismic unity and harmony. The "image of God" in man is the fleeting, finite and fragmentary realization of the Divine creative thrust. For all its transitoriness, man's awareness of God is certain, intuitive and a source of self-renewal.

We may speak of God as Person, in both affirmative and negative senses. In its affirmative meaning, personhood means unity in space and time, imposing one Law upon the whole of creation, embracing the past in memory and the future in intention and in affirmation. In its negative sense, personality is self-defined by that which it excludes. So, in the case of God, while all events are His work, through the operation of the laws of

1. Following is a selected bibliography on the themes of revelation and halakhah: *Guideposts in Modern Judaism*, chapters four to nine; *Dialogue and Tradition*, pp. 427–501 and 523–553; Proceedings of the R.A., especially '76; "Revelation as Quest," *Journal of Ecumenical Studies*, 1972, vol. 9; "Mizvot-yes, Averot-No," *Reconstructionist* Magazine.

Two essays, scheduled for publication soon are: "Maimonides' View of God's Work in History," *Jewish Quarterly Review*, Special issue in Memory of Solomon Zeitlin, and "Neo-Maimonism — Implications of Maimonides' Philosophy for Jewish Law in our Day," in *Essays on Theology*, to be published by The Rabbinical Assembly.

JACOB B. AGUS *is rabbi of Beth El Congregation, Baltimore, Md.*

nature, not all events, taken in isolation, reveal His will. In a work of art there is a framework, material content which may be infinitely varied, and the intention of the artist that may be clearly manifested or only dimly apprehended by unconscious intuition.

Personality is the highest exemplar of holistic unity that we encounter in our human experience. Personality points to God, without delimiting Him. He is "the Soul of souls" (*neshamah lineshamah*). We dare not attribute the merely human qualities of speech and temperament to Him, except in a metaphoric sense. Rabbi Simlai's restriction of divine revelation at Sinai to the first two of the Ten Commandments is an apt description of divine-human encounter.[2] God opens ever new horizons by His self-revelation in our hearts and minds. He is revealed in man's ascent from slavery to freedom and in the progressive rejection of idolatry, be it gross or subtle.[3] Every revelation of God's Will in the human soul can turn idolatrous when it is taken to be the last word of the living God. Every step toward freedom that mankind takes is divine in inspiration and orientation, but it is just a finite step, no more, on an infinite road.

Revelation

God reveals Himself to us in many different ways. His Will is manifested at the several cutting edges of the human spirit — in the infinite outreach of man's quest for understanding, in the imperative call to overcome the ills of society, in the inspiring moments of holiness. Plato's triad, the True, the Good and the Beautiful, was an inspired but time-conditioned formulation. Truth is an elusive goal and the awareness of limitation accompanies man's intellectual quest. Ethical imperatives are divine, but every step of social progress uncovers new tasks. The glory of beauty is most liable to perversion through the seduction of pleasure. True beauty includes the dimension of the sublime or the holy — hence, an intimation of infinity.

In each aspect, the awareness of negation, knowing that we do not know, is integral to the experience of revelation. As in the nineteenth Psalm, day speaks unto day and night unto night but "there is no speech, there are no words." Indeed, viewed in the perspective of the history of religions, the faith of the Biblical authors stresses the negational dimension of the faith-event more than the affirmative one. The Hebrew Scriptures "de-sacralized" not only nature, but also history, setting strict categories for manifestations of the divine will.

Several modern Jewish thinkers, succumbing to the influence of German philosophy, contrasted the pagan sanctification of nature with the Jewish sacralization of history. It is true that God is revealed most clearly in the expanding domains of the human spirit, but the course of human events is not identical with the advance of ethical sensitivity and

2. B.T. *Makkot* 23b. In the name of R. Yishmoel, *Horayot* 8a.
3. Philo interprets "the image of God" in man to be the capacity for freedom.

moral vision. God is revealed *in* history, not *through* it. Judaism rejects the arrogant triumphalism of the historicists, whose slogan is "World history is the world court." The God of Israel appears in history as the champion of slaves, intent on reversing the course of history. And for two millenia, and against all odds, the Jewish people cherished the hope of rebirth. Only certain events in history manifest the divine will; others are consequences of the darker side of human freedom. As the *Mekhilta* on the crossing of the Red Sea points out, God appears at times as a leader on the battlefield, at other times as a sage teaching in a *yeshiva*.[4] As to which is which, in every instance the conscience of great and holy men must judge.

In addition to this general revelation, which is fleeting and unstructured, Judaism affirms the special revelation, which is embodied in its literature and its patterns of living. In the Hebrew Scriptures, the sacred tradition is mediated through the minds of three kinds of holy men — the priests, the sages and the prophets. "For Torah shall not perish from the priest, nor counsel from the wise, nor the word from the prophet" (Jer.18,18). (This is why we use the acrostic *Tanakh* — Torah, prophets, writings.) Different aspects of wisdom and piety are likely to be conveyed by each category of teacher. Because of the tensions resulting from these different approaches, the Biblical faith was dynamic and many-sided. While archaic elements remained, countervailing influences were set in motion.

To consider matters of Halakhah apart from their historic settings and deeper meanings is to follow in the wake of the ancient priests exclusively. The Talmud recognized that sheer legalism was a disease of religion. "Whoever says, 'I care only for Torah' will lack even Torah" (*Yebamot* 109b).

The "Sages of Israel," as the Pharisaic scholars called themselves, tried to preserve the ethical thrust of the prophets and the wisdom of the sages as well as the ritual of the priests. In the opening Mishnah of *Avot*, they even excluded the priests from the chain of transmission. The Aggadah contains, in gnomic form, maxims reflecting the philosophies of the ancient world, along with the impassioned ethical fervor of the prophets. Philo, the first philosophical exponent of Judaism, was a Greek-speaking Aggadist, incorporating into the tradition the so-called "beauty of Japheth."

Scholars have discerned two diverse approaches in the Palestinian schools of Rabbis Akiva and Ishmael — the former inclining toward literalism, the latter toward a reasoned interpretation. The literalist school produced also the *Shiur Komah* (descriptions of the Divine Glory) type of mystical literature which formed the foundation of Kabbalah, while the rationalistic school kept the gates open to the contemporary winds of philosophic speculation. Medieval Jewish philosophy, climaxed

4. Additional references in A. Urbach's *Hazal*, p. 29, note 1.

in Maimonides' *Guide,* was the most massive attempt to synthesize the three currents of tradition — that of priest, sage and prophet.

Maimonides effected this synthesis in three crucial ways — by viewing the tradition in the light of the history of religions and describing protests against ancient idolatries; by postulating Secondary Intention on the part of God as the source of the entire sacrificial system in the Holy Temple, and by introducing the distinction between "true doctrines" and "necessary doctrines". The former are true in themselves, the latter are affirmed by the sages in order to retain the cohesion of the community.

While lesser philosophers, both before him and after him, were content to separate and insulate the two domains of reason and religion, Maimonides insisted that worship must be wholesouled. Only if Judaism promotes philosophical piety does it have the right to demand self-sacrifice and even martyrdom. We learn from Maimonides that not all *halakhot* are born equal. We have to study their origin in history, their justification in philosophy, their pragmatic consequences, their merit in terms of the primary intention of faith.

To be a Jew is to share in the priestly, prophetic and philosophical tradition of the living community of Israel (*K'lal Yisroel*), with the inevitable development of diverse schools of interpretation.

Halakhah

Conservative Judaism is one such school. It seeks to be true to the *whole* of our sacred tradition, to its inner philosophy as well as to its outer expression. As Conservative Jews we accept the Halakhah as a starting point, not as a blueprint. It is one of the given components of our tradition, not all of it. Torn from its context in life and thought, Halakhah is meaningless.[5] Every particular command should be open for evaluation in terms of the totality of the evolving sacred tradition.

For the purpose of clarification, some negations are in order:

We are not literalists — that is, we do not assert that the Torah was dictated to Moses, word for word, and that the Oral Law was transmitted verbally to him and to his successors. Therefore, the inner logic of a great deal of Halakhah is, for us, not in itself persuasive. Nor is a custom in itself hallowed in our eyes solely because it has been practiced by many or even most of our people. For example, *shlogen kapores*. We have outgrown folkist romanticism. Nor do I and many of my colleagues follow the German super-conservative school of Savigny which idolized the institutions created by history as sacred, "positive-historical." We know all too well how many anti-Jewish horrors were sanctioned by that attitude.

We see the Jewish global community as centered in its religious life around sages — more exactly, priests, prophets and teachers of wisdom. In contemporary life, those categories do not coincide with any particular

5. In this sense, the Midrash speaks of Torah as "the decayed fruit of the wisdom that is above" (Genesis *Rabbah* 17,5;44,17).

organized group. The rabbinate, in its totality, does not today exhaust the category of the ancient *ḥakhamim*. There are academic philosophers, individual scholars, educators and social workers, journalists and authors, who, in diverse ways, contribute to the making of the Jewish mentality. Associations of synagogues comes closest, perhaps, to the representation of *K'nesset Yisroel*, the religious fellowship of Israel. With the progressive contraction of the domain of religious life to the precincts of the Synagogue, the norms and standards adopted by congregations will be decisive in molding the Halakhah of the future.

Takkanot

The Talmud speaks of those who violate an ordinance of the sacred tradition as rebellious children, disobeying their Father, who is God, and their Mother, the Congregation of Israel. Every ordinance is a product of both parents. To the naive, the divine aspect is visualized in external terms. We recognize the work of God in the living people, molded as it is by its historical institutions and guided by its spiritual leaders.

Therefore, in our view, the tradition develops by way of new *takkanot*, new *aggadot* and new *minhagim*. *Takkanot* are ordinances of conduct initiated by the spiritual elite; *aggadot* are new ideas that arise either out of Judaism or out of universal culture; *minhagim* are customs initiated by the people and concurred in by the *elite*. No strict lines of demarcation can be drawn between these several instruments of halakhic development. Scholars used to draw absolute distinctions between the imposition of dogmas upon the free mind, which is intolerable, and the imposition of ordinances of conduct upon a free people, which is acceptable. The distinction is only partially valid, for there is no conduct that causes mighty changes in society, which does not imply certain ideas, and there are no ideas of consequence which do not affect the lives of people.

Takkanot, aggadot and *minhagim* aim to affect all concerned Jews, but they are usually initiated by individual congregations (*takkanot hakehillot*).

K'lal Yisroel

The Conservative movement focused attention on the concept of *K'lal Yisroel*. I accept Dr. Gordis' interpretation of the term as the consensus of the concerned. In a free society, agreement will be gradational. In regard to essentials there will be a consensus, while there will be ample room for variations in ideology and practice.

A new factor of uncertain character is likely to modify the impact of *K'lal Yisroel* — namely, the government of Israel. Its relation to matters of personal status is well-known. Orthodox pressure in regard to Sabbath observance is also a factor. But, social issues are even more significant, if we think of Halakhah in its ethical dimensions. We have to take account of questions in the realm of political science that our predecessors could comfortably ignore. What is the ideal relation of the Jewish religion, its

Aggadah and its Halakhah, to the Jewish state? Is the citizen of such a state ipso facto a member of the Jewish people? Should such a state be structured in keeping with the laws of Torah, or the principles of Torah, or the concepts of liberal democracy, the *ḥokhmah* of our time? Will the equality of the *ger*, affirmed thirty-six times in the Torah, apply to all the non-Jews in a Jewish state? Is a Jewish state conceivable that is not democratic? Shall Israel follow the model of western democracies, separating religion from government, or the model of an "Islamic state," à la Ayatollah Khomeiny?

Manifestly, the character of Halakhah in Judaism will be powerfully affected by the extent of its involvement with the government of Israel. Laws of religion and of government are different in essence. To make governmental privileges dependent on the practice of religious rituals and on the *kashrut* of those who administer them is a horrendous requirement in a western society. We cannot tell how Israel will develop in the future. So much depends upon whether a large Arab minority, consisting of the residents of the West Bank and Gaza as well as Israel proper, is embraced within the boundaries of the state. With a non-Jewish minority of nearly 40%, a new constitution may evolve, definitely separating religion from government. Also, spiritual forces emerging from grass-roots Israeli life may well lead to an acceptance of religious pluralism.

Halakhah as religious law can be perverted into secular law, but, ideally, the two domains must be kept apart. For secular law takes no account of intention or relegates it to the background, while, in religion, the demands of spirit and piety are all important. In any case, the import and orientation of the *K'lal Yisroel* ideal is certain to be affected by developments in Israel, which cannot now be foreseen.

The negative implication of *K'lal Yisroel* is the refusal to read out of Jewish life those who differ from the majority in their interpretation of Judaism. A blurring of the lines of ideology within the Jewish community is the inevitable consequence of such a policy. There may not even be complete consistency within the Conservative movement, because of the need to reconcile the imperatives of progress with reverence for unity.

A case in point is the enfranchisement of women within congregational life. The first step was to institute *Bat Mizvah* observances as part of the Sabbath services. The next step was to grant *aliyot* and other honors to women, and to count them as part of a *minyan*. Once these steps have become accepted by the overwhelming majority of Conservative congregations, others, such as the ordination of women, might well be in order.

The gradational pace of change is itself part of the Conservative approach. In our endeavor to be faithful to the whole of our tradition, we need to shun the broad decisiveness of the ideologues.

Ecumenism

If the rise of Israel is bound to affect the course of Halakhah by changing the objective circumstances of Jewish life in Israel and by adding

a fresh and triumphant note to our *aggadot*, the ecumenical movement is also likely to introduce new patterns of Jewish-Christian-Moslem relations. Like the State of Israel, the interfaith movement, involving Judaism, was a delayed reaction to the Holocaust.

It is important to recognize that the Halakhah in regard to non-Jews was frozen in the form that it assumed at Yavneh at the end of the first century. Some general principles were enunciated — such as the Noachide laws, in all their ambiguities, the recognition that not all Gentiles are worshippers of "strange gods," etc. But, the relevance and application of these laws to Christians and, later, to Moslems, was left undetermined and was vitiated by the demands of apologetics. The times were not suitable for a positive evaluation.

In our day, the interfaith movement has already resulted in the breaking down of barriers in the field of learning and teaching. The old prohibition of "teaching Torah to Gentiles" is no longer taken seriously. In the field of *gemilut ḥasadim* there is bound to be increasing cooperation. Joint religious services to celebrate great national events are becoming the norm, rather than the exception, in American public life. What shall be the governing principles of such interfaith activities?

Other issues in this field have already moved to the forefront of our agenda. Can we continue to close our eyes to intermarriages and refuse to participate in their sacralization? Can we refuse to acknowledge the Jewishness *in potentia* of the child of a Jewish father and a Christian mother?

Must we regard intermarriage always as a loss, instead of as a potential gain? If the living faith of liberal Christians is close to our "sacred tradition," where is the line to be drawn? Has the time come to revive the category of *yirai hashem*, the Fearers of the Lord, insofar as Christian spouses of Jews are concerned? Must we insist on *hatafat dam* in the case of a Gentile circumcized male converting to Judaism?

These and similar questions are bound to open up new areas for the different philosophies of Jewish law.

Summation

In sum, Halakhah is intimately related to the contemporary forms of wisdom and the unfolding vistas of personal and social ethics. Hence, our critical understanding of Bible and Talmud enters into our interpretation of the dynamics of Jewish law, as well as our philosophical conception of the nature of the divine thrust in history. Halakhah must be responsive to the best ideals of every age. To be sure, "whatever *needs* not to be changed, needs *not* to be changed." Advances should be made with due regard to contemporary sensibilities, to the lessons of history and to the visions of the future. In our age, the emergence of the State of Israel and of the inter-faith movement present fresh challenges to the making of Jewish law.

There Is No "One" Halakhah

IRA EISENSTEIN

AS USUAL, DR. GORDIS DISPLAYS IMPRESsive scholarship, and he writes with clarity and eloquence. Unfortunately, his account does not provide guidance with respect to the pressing question: where do we go from here? The reason that this guidance appears to me to be lacking is that he reifies the Halakhah, that is, he objectifies it, concretizes it, and treats it as though it were a living entity, when, as a matter of fact, it is a term which describes the norms of behavior accepted by the Jewish people in a given place at a given time.

For example: "There are also many examples of the Halakhah responding *to new economic conditions*" (p. 268). "The Halakhah exhibits another related instance of its responsiveness to changed economic conditions . . ." (p. 269). "The Halakhah, therefore, proceeded to apply a series of casuistic limitations to the text on Deuteronomy" (p. 272). ". . . the Halakhah limited the application of the death penalty" (p. 273). ". . . the Halakhah took steps to reduce the power of the husband . . ." (p. 278). ". . . *the Halakhah reveals a deep concern for basic ethical considerations . . . In all periods the Halakhah manifests its lively awareness of social, economic, political and cultural facts in the life of the Jewish community*" (p. 279-280).

Now, if one looks behind the anthropomorphisms, one recognizes that Dr. Gordis is actually referring to the *authorities* who "responded," or "exhibited," or "proceeded," or "limited," or "took steps," or "revealed," or "manifested." Whatever they did successfully, became the Halakhah. As we look back in history, we discover, with Dr. Gordis' help, that these authorities may have been a collective body, like the Men of the Great Synagogue, or the Sanhedrin, or individual Rabbis with status and reputation sufficiently powerful to make their decisions stick.

These authorities were prompted by a variety of motives. Sometimes they were moved by ethical considerations, sometimes by a passionate desire to see the Jewish people survive, sometimes they yielded to popular pressure. Dr. Gordis very clearly illustrates instances of each. But whatever the challenge of the moment, the authorities were bound by their own commitment to the proposition that "the Torah, (was) the word of God" (p. 271). Obviously, there were limits to what they could permit themselves to do. This fact, it seems to me, is at variance with Dr. Gordis' contention that the "technique of Mishnah" "created the potential for a Halakhah that would be appropriate to all times and conditions." The author himself seems to recognize this when he deals with the "modern

IRA EISENSTEIN *is president of the Jewish Reconstrucionist Foundation and of the Reconstructionist Rabbinical College.*

period, marked by the Enlightenment and the Emancipation, which wrought havoc with the traditional patterns of Jewish life."

What Dr. Gordis fails to underscore is the *intellectual* havoc wrought by the Enlightenment. When millions of Jews, under the impact of their exposure to western thought, began to doubt that the Torah was "the word of God," the authority of the Halakhah was severely shaken. In addition, the sociological revolution ("The admission of Jews into political citizenship, civic equality and economic opportunity . . .") virtually liquidated the previously intact and autonomous Jewish communities in which the locus of authority was clearly identified and broadly accepted.

The "Role of the Popular Will" is now radically transformed. When the "common people" still reflected the consensus to which the authorities were prepared to bow, that consensus was based upon the common acceptance of traditional postulates. In post-Emancipation years, Dr. Gordis would surely qualify the dictum, "Go out and see how the people conduct themselves." Elsewhere he has made it clear that the popular will cannot refer to the entire populace, but only to those who observe Jewish law and recognize its authority over them.

Which leads us to the central question: where does authority lie today? Where should it? How reinstate the rule of Halakhah? How render the Halakhah viable at the end of the 20th century, both in the Diaspora and in Israel? These and related questions are not dealt with directly by Dr. Gordis; yet the reader cannot help but surmise that he did not write this article merely to deliver a learned lecture on the "dynamics of Halakhah" in the past. Nor did he conclude his article as he did without implying that the future will witness the same kind of dynamism. (I refer to: *"The notion that the Halakhah and 'sociology' are antagonists that are in perpetual confrontation with each other and must be kept at arm's length from each other is a major error."*)

If that surmise is valid, then we must take issue with his implied thesis. I am convinced that we Jews have come to the end of a major, prolonged chapter in our history. If the writing of the Mishnah marks its beginning, the liquidation of the Jewish community qua community and the establishment of the State of Israel mark its closing. The time has come for a thorough reconstruction of our body politic. A new Mishnah must be written. Norms and values must be formulated in light of the democratic spirit, which means that authority has shifted from the Rabbis to the people's representatives, elected by them and responsible to them.

It means, for the Diaspora, the recreation of communities to replace the congeries of organizations which now purport to represent the Jewish "people." It means the right and the power to legislate, even if this involves amending the "constitution." In Israel, it means stripping the Rabbinate of its theocratic privileges. It does *not* mean that Jews can, or should try to, live without Halakhah. *The* Halakhah, as we know it, is a thing of the past. Dr. Gordis has written a fitting epitaph for it.

Sufficiently Dynamic?

SOLOMON B. FREEHOF

IT IS A PRIVILEGE TO BE AMONG THE COMmentators on Robert Gordis's article on "A Dynamic Halakhah". The article is a magnificent purview of the inner history of the halakhic tradition in Judaism. In tracing the history of Halakhah, Robert Gordis proves convincingly that it was never monolithic and unchangeable. It was always able to find adjustment to changing social conditions and even to changing ethical ideals. Future discussions on the nature of the Halakhah will need to make use of this knowledgeable, complete and imaginative essay.

Of course, the purpose of the essay is more than to make a contribution to the history of Jewish legal culture. It is also meant to be a directive and guide in future changes in Jewish life and, of course, in dealing with our present changeful situation. Therefore, the vital, implied but unasked question goes beyond the title, "A Dynamic Halakhah" and becomes the question of the *adequacy* of the Halakhah in our present situation of the Jewish people. It well may be that, today, in certain major areas of human interest and experience, the changes which life has brought have come on us so rapidly and are so drastic that our legal inherited system can no longer cope with it. The secular legal system of a modern government, when faced with rapid change in social life, has a means of coping with a new situation which the Halakhah cannot possibly have. A Legislature or a Congress can devise laws that are completely new and even contradictory to previous laws. It can completely abolish previous laws and substitute new ones, thus forging new instruments for meeting new problems. But, obviously, the Halakhah cannot easily abolish old laws and create new and unrelated legislation, since, presumably, the Halakhah is God-given and, whatever changes are made, they must be somehow derived from the earlier body of law. Therefore, faced with the modern situation, we cannot avoid asking, *how* dynamic and *how* adequate is the Halakhah today?

That this question is germane can be seen if we review the gallant efforts made by the Conservative movement in dealing with the question of the *ʿagunah*. The process may be said to have begun with the learned work of Louis Epstein, which, by the way, was bitterly denounced in the entire book of Orthodox polemics (*L'Dor Aḥaron*). Then, there is Lieberman's plan, which would mean that a woman might sue in the courts if her husband refuses to give a *get*. Finally, there is the latest suggestion that the

---

SOLOMON B. FREEHOF *is rabbi-emeritus of Rodef Shalom in Philadelphia, Pa.*

rabbis use their ancient authority to declare the marriage null and void *ab initio* so that no *get* is needed at all.

By the way, this last device has, in a way, already been put into practice by leading Orthodox scholars in relation to non-Orthodox marriage. Moshe Feinstein, (in his *"Igros Moshe,"* New Series, *Even Haezer* 23, 26) was faced with the common situation of a man refusing to give a *get* to his divorced wife. Feinstein discovered that the couple had been married by a Reform rabbi. Thereupon he declared that the marriage was null and void, since there were no "kosher" witnesses at the wedding ceremony. Clearly, he would accord the same privilege to Conservative marriages, since he once prohibited the bringing of a "kosher" Sefer Torah to a Conservative *shul*. Another Orthodox rabbi, Menashe Klein, was confronted with the question whether or not he might officiate at the marriage of Jewish couples, children of parents who had remarried without a *get*. He also declared the first parental marriage null and void so that the children were legitimate. Of course, the Conservative suggestion to declare the marriages void has its difficulties. It is true that if the marriage of the parents is declared *ex post facto* null and void, the children of that marriage are by Jewish law legitimate, but would they be deemed legitimate by their friends and by themselves?

In discussion the question of the *ʿagunah*, Dr. Gordis says that the problem is with the women loyal to the Halakhah. But, really, how many women in the modern world feel bound in loyalty to the Halakhah? No one has statistics as to how many Jewish women — whether Reform, Conservative or vaguely Orthodox — have already been remarried without obtaining or caring to obtain a Jewish *get*. What shall be the situation of all the children of these remarriages? How can we declare that a large percentage of Jewish children born in modern countries are, by Jewish law, not legitimate? In the light of the present social situation, which may be far too extensive for the Halakhah to cope with, no matter what devices we invent, it may be that this is an element in the law which, like the *ʿeglah ʿarufah*, "the rebellious son," and *sotah*, will simply fade away and cease to exist as law. We have no one of the authority of Yochanan ben Zakkai who can flatly declare such laws void. Life will have declared them void and we cannot change the situation. The concept of *mamzerus* as a blot on children whom the civil law considers legitimate cannot possibly endure. It is already vanishing as a credible or acceptable law.

Of course, this inadequacy of the Halakhah to cope with the present situation applies only to certain specific fields of experience. There are still many fields of experience which can continue to be guided by the Halakhah and there this creative essay of Gordis, proving the dynamic nature of the Halakhah, will certainly continue to be a valuable guide.

Halakhah is Absolute and Passé

EUGENE MIHALY

THE OVERWHELMING MAJORITY OF JEWS IN Israel are non-religious or anti-religious secularists, for whom Halakhah, in any traditional sense, is meaningless and often an object of derision and contempt. The areas with which Halakhah largely concernns itself — from dietary discipline, to the so-called "laws of family purity," to the minutiae of Sabbath and Festival observance, to the details of divorce and marriage laws — play, at best, a miniscule role in the lives of the preponderant majority of American Jews. Business law, which occupies over one-fourth of the *Shulhan Arukh* has, for all practical purposes, been abandoned even by the Orthodox. With all our profound sympathy for, and our determination to do all that is possible, and more, for our fellow Jews in the Soviet Union, we cannot delude ourselves that the non- or anti-religious attitudes of the vast majority are due to external coercion. They have rejected Halakhah for generations. In the face of this reality, obvious to the superficial observer, Dr. Gordis would have us believe that

> The techniques of Halakhah . . . reveal the openness of the tradition . . . and enable the Halakhah *to survive and function successfully* under such radically changing social, economic and political conditions as . . . the early laissez-faire capitalist order, the emergence of democracy and the welfare state and . . . the as yet unknown social orders of the future. [emphasis mine]

Traditional Halakhah resisted and, with rare exception, fanatically fought with every weapon at its command — social ostracism, economic sanctions intended to bankrupt and impoverish, secular power, even informing was not too extreme — every creative impulse and movement in modern times: from the Haskalah, to the renascence of the Hebrew language and modern Hebrew literature, to the slightest change in the liturgy or religious ritual and custom (even if the changes were based on classic halakhic sources), to Zionism. The outstanding halakhic authorities even saw a mortal threat in Hassidism, in its initial creative period, before it was co-opted and then degenerated into a dynastic irrelevancy. The state of Israel was, and is, today given only grudging, *post facto* acquiescence by leading halakhic authorities, the *poskei ha-dor*. These facts are undoubtedly well known to Prof. Gordis, and yet he finds it possible to state that

> . . . the potential for a Halakhah that would be appropriate for all times and conditions *was actualized* because in *each generation there were scholars possessing the insight, compassion and courage to apply the Halakhah of the past to the problems of the present.* [emphasis mine]

EUGENE MIHALY *is professor of rabbinic literature and homiletics, at HUC-JIR, Cincinnati, Ohio.*

In describing ". . . the method by which the Halakhah grows . . .," Dr. Gordis states that the "spiritual and intellectual leadership in Judaism" will judge some

> new elements struggling to be admitted into the sanctuary of tradition . . . as dangerous and ill advised and will reject [them] in toto. Others it [the spiritual and intellectual leadership?] will judge to be *ethically sound, religiously true and pragmatically valuable* and these will be *incorporated* into the content of tradition. [emphasis mine]

Does Prof. Gordis find the evidence for his summation in the responsa of the leading halakhic authorities of the 19th century, like Moses Sopher, Akiba Eger, Mordecai Benet, Eleazar Fleckeles or Jacob Lissa, among hundreds of others, who responded to the revolutionary upheavals in Jewish life with a fanatic intransigence and who decried the slightest innovation, no matter how well intentioned, as bordering on apostasy? Or is the basis for Prof. Gordis' conclusion the contemporary responsa of the rabbinate in Israel, in their dealing with the problems of service in the armed forces by Yeshiva students, or of the status of children of intermarriages, or the permissibility of autopsies, or the status of women, or the Halakhah as it applies to the non-Jew, with the result that the word *dati* (religious) has become, for most Israelis, a term of opprobrium and derision? Or does Dr. Gordis discover the criteria of "ethically sound, religiously true and pragmatically viable" in the responsa of the *gedolim* like Rabbi Moshe Feinstein or of the contributors to *Ha-Pardes* and *Ha-Maor*? Where does Rabbi Gordis find evidence for his remarkably sanguine apologia?

"The openness of the tradition . . ." and "the creative resolution of the tension between law and life . . ." are illumined for Dr. Gordis in the techniques of the Halakhah: *Midrash* and *Mishnah*. He characterizes the method of *Midrash* as "deductive;" it deduces "implications for contemporary life" from the Biblical text. This deductive method, ". . . embodied principally in the . . . *Mekhilta, Sifra* and *Sifre* . . . was virtually exhausted in the Tannaitic age . . ." because ". . . no matter how fruitful the text and ingenious the method of interpretation . . . the possibilities of Midrash are . . . inevitably limited by the parameters of the text." The *Midrash* method is contrasted by Prof. Gordis with that of *Mishnah* which he describes as "inductive." It ". . . has its starting point in life situations . . . is as unlimited as life itself . . . is embodied in the Mishnah compiled by Rabbi Judah Hanasi . . ., in the Gemara both of Palestine and Babylonia . . . [and] . . . is the method par excellence of the Rabbinic *Responsa* . . . a mighty stream . . . showing no signs of diminution even today . . ." The *Mishnah* method is, thus, "the technique" for Dr. Gordis which ". . . created the potential for a Halakhah that would be appropriate to all times and conditions" — a potential actualized in each generation.

This reconstruction of the halakhic process is supported neither by the sources, nor by the results of modern scholarship. The Mishnah of

Judah Hanasi cannot be identified with the *Mishnah* method of the early Tannaitic period, even less so the Gemara — Palestinian or Babylonian — and, least of all, the method of Rabbinic *Responsa*. The Mishnah of Judah Hanasi is not "inductive," nor is its "starting point the life situation," nor is it "as broad as life itself." Judah Hanasi did not innovate in his Mishnah; he codified. His Mishnah records either Biblical laws according to the *p'shat* of the Scriptural text, or, more often, the laws as derived through Midrashic exegesis, or long established traditions. The elements of the *Mishnah* method present in Judah Hanasi's Mishnah are a topical organization (rather than one which follows the Biblical order), and the omission, most frequently, of the proof-text. The Biblical source is, however, even when it is omitted, usually implicit in Judah Hanasi's formulations. (The Tosefta or other *Baraitot* often make it explicit.) The topical organization adopted by Judah Hanasi is also the result of a lengthy development and is not the same as the earlier Mishnaic curriculum.

Similarly, the Midrash Halakhah is, perhaps, most typically not deductive — except in external form, which is often more fictional than substantive. The text is, as often as not, a pretext. A cursory glance at the *Mekhilta, Sifra* and *Sifre* reveals that the Rabbi frequently brought his conclusion to the text rather than deriving his lesson from the verse. In choosing a particular hermeneutic device or exegetic syllogism with which to expound a Biblical text, the Rabbi guaranteed a specific conclusion — a conclusion that he reached *a priori* on the basis of factors quite independent of the meaning of Scriptures. The Midrash Halakhah, with its pleonastic hermeneutics, is far less limited by the Biblical text than are the Gemara by the Mishnah of Judah Hanasi, or the Rabbinic *Responsa* by the Babylonian Talmud.

The decline and eventual disappearance of the Midrashic curriculum in the academies of Palestine and Babylonia was due, not to the limitation of the Midrashic method, as Dr. Gordis would have it. A method which permits the "derivation" of "mounds upon mounds of laws from every jot" in the Torah, a method which allows for imaginative exegesis of every particle and has in its arsenal thirteen or even thirty-two rules of hermeneutics is not easily, or soon, exhausted. The ability to derive from the Torah farfetched and even absurd conclusions was, after all, one of the qualifications, according to the Rabbis, for appointment to the Sanhedrin (". . . *'el'a mi sheyode'a letaher et hasherez min haTorah*" — *Sanhedrin* 17a). Maimonides fully appreciated the dynamic potential of the entire Aristotelian system — with neo-Platonized modifications — in the Torah. (The *Guide* is a Midrashic work.) By the twelfth century, however, *Midrash* could be used only haggadically. In the realm of Halakhah, the Mishnah of Judah Hanasi and the Babylonia Gemara were the final authority. Similarly, Moses de Leon would legitimize and introduce into Judaism significant aspects of a Gnostic dualism through *Midrash* (the *Zohar* is a major and innovative Midrashic work).

After the Mishnah of Judah Hanasi gained acceptance as the authoritative code and became the primary text in the curricula of the Palestinian and Babylonian academies, the *Midrash* as a method for Halakhah was inevitably doomed. Midrashic exegesis, with its claim to a higher, Biblical authority, potentially, and even actually, posed a threat to the absolute authority of the Mishnah and of its Amoraic interpreters. The fact that sectarian groups like the Gnostics and Christians used *Midrash* to establish their legitimacy and the authenticity of their doctrines was, undoubtedly, also a factor in the progressive limitation and the eventual disappearance of the Midrashic curriculum. The primary cause was, however, the codification of the Mishnah by Judah Hanasi. Henceforth, its definition of the Halakhah could not be challenged by appealing to a Biblical verse, midrashically interpreted.

The establishment of the Mishnah of Judah Hanasi as the authoritative code tolled the knell not only of *Midrash* but of *Mishnah* as well, and charted the course that Halakhah would follow for two millenia. The central concept of classic Rabbinic Judaism, that of the "Oral Law," was reduced to a fiction and a verbal nicety. After the codification of the Mishnah, followed inevitably by the codification of the Babylonian Talmud and the series of successive codes, every vestige of the "Oral Law" disappears. Only a "Written Law," now much more elaborate and restrictive — without the liberating elements of *Midrash* and *Mishnah* — remains.

To characterize the Rabbinic *Responsa* as "inductive," or "as unlimited as life itself," and its method as that of *Mishnah*, as Dr. Gordis does, is to resort to fanciful hyperbole not even remotely related to reality. Certainly, the questions addressed to the halakhic authorities arose from the life situation and dealt with the gamut of problems in each age. But did the Rabbinic respondent dare innovate, or, Heaven forfend, contradict a law from the Mishnah, or the Babylonian Talmud or even an authoritative precedent? An ever greater stringency and an encrusted literalism are the dominant mood of the literature. The Rabbinic authority could only teach, apply, arrange, codify — and, in more recent centuries, display his piety to his colleagues by demonstrating that he could be more punctiliously stringent than they. The contemporary, traditional Halakhist is enchained by an all-embracing "Written Law" as well as by his own timidity — the result of many dark centuries of precarious existence in a dominant environment determined to dehumanize the Jew and to brand him a grotesque, devil-possessed monstrosity.

The response of Judah Hanasi to the cataclysmic events of the early centuries of this era — the destruction of the Temple and, especially, the devastation which resulted from the failure of the Bar Kokhba rebellion — may have represented a necessary strategy of survival for that time and place. A rigid "Written Law," a codified, absolutistic halakhic structure, undoubtedly also served as a shield, a blessed protective wall during the medieval period. The halakhic way of life kept the Jew human and helped

him achieve an amazing — a miraculous dignity. The rigid discipline of *mizvot* and *ma'asim tovim* was the major factor in the survival of the Jew and produced generations of scholars, saints and martyrs who daily sanctified God's name and who bore witness to the possible and to the vestige of *humanum* which persists even in a world steeped in *profanum*.

But what may have been a positive, nurturing program in third century Palestine, or in the medieval ghetto, or even in the *shtetl* of the early 19th century becomes a strategy of irrelevance and bankruptcy, and may even be suicidal in an environment of freedom — in a mobile, open society — and in a cultural context where voluntary adherence, not coercion and power, are the only live options.

Halakhah and its authoritative spokesmen tragically failed in their response to the revolutionary upheavals in Jewish life in the 19th and 20th centuries in Western Europe, in the Pale and, with the most grave consequence for the future, in the United States and Israel. The situation required — the creative survival of a Torah which has meaning and relevance demanded, and demands today, — a bold, courageous, even a heroic revival of a genuine Oral Law with its methods of *Mishnah* and *Midrash*. But the medieval mentality was, and is, too firmly entrenched. The current activity of those who have appropriated Halakhah as their exclusive domain indicates that the malady is too far advanced — beyond recovery. Perhaps the time has arrived to abandon the term "Halakhah," which has become a catchword and shibboleth and to speak of Torah — a living Torah.

Prof. Gordis may find comfort, as have surreptitiously rebellious yeshiva students for the past century, in the *prosbul* of Hillel. It is significant, however, that he has to skip over more than 2,000 years of Jewish life, to the first century B.C.E., to find buttress for his thesis. He fails to mention, however, that the Mishnah mitigates the radicalism of Hillel's ordinance by stating that his concern was another Biblical commandment: People refrained from "lending one another and thus transgressed the Biblical injunction, 'take heed lest there be a base thought in your heart when you find that the seventh year, the year of remission, is near and you be hostile to your poor brother and you give him nothing . . .' (Deut. 15:9)." Hillel, according to the Mishnah, when forced to choose by existing circumstance, gave preference to one Biblical law over another. He did not abrogate a Scriptural commandment. Dr. Gordis also fails to mention that the entire discussion in the Gemara (*Gittin* 36a, f.) is directed towards proving that Hillel could not possibly have tampered with a Biblical law. I am also not as confident as Dr. Gordis appears to be that Hillel was motivated by ". . . a deep solicitude for those in need . . ." The Babylonian Amora of the late third century, Rav Ḥisda, already noted that the *prosbul* was instituted for the benefit of the rich *and* the poor (*Gittin* 36b, f.). An objective student would also have to consider whether it is usually the "underprivileged" or "those in need" who are the money-

lenders, and they were the ones who were the prime beneficiaries of Hillel's *taqqanah*. In any case, whatever the precise nature of Hillel's *prosbul* may have been, one is hard-pressed, indeed, if he needs to appeal to an event of two millenia ago to illustrate the "dynamics of Halakhah."

Dr. Gordis cites the *sh'tar heter 'iska*, which circumvents, through a legal fiction, the Biblical prohibition against taking interest from Jews, as another example of the responsiveness of Halakhah. Even if we disregard the invidious distinction between Jew and non-Jew implicit in this Biblical law and its later modifications, the "legal fiction" device as a method of coping with new situations should give one serious pause. This casuistic method of responding to changing circumstances may have been acceptable in a medieval context which operated with the myth of a literal, Divinely-revealed law. The experience of the centuries and the perspective that it yields should cause one to consider the negative and even the debilitating effects of utilizing a method which gives primacy to, and encourages, external form at the cost of substance. What are the psychological effects of the charade of "selling the leavened" to the non-Jew or of the numerous other legal fictions with which traditional Halakhah operates? Would Dr. Gordis seriously suggest that a religious program which relies on such methods — empty, meaningless forms which distort and evade the true intent — could address the spiritual yearnings of the contemporary Jew? If Judaism is to compete in the intellectual arena of an open society and attract enthusiastic devotees, must it not represent the highest integrity — forthright, honest — not devious casuistry?

Undoubtedly, the *taqqanot* of Rabbenu Gershom concerning a wife's consent for divorce, against polygamy, etc., are indications of the stature and the outstanding qualities of leadership which this "Light of the Exile" represented. One searches in vain, however, for another similar example in the over nine centuries since his day. Without detracting from the boldness of Rabbenu Gershom in issuing his ordinances, one does have to note that his decrees only validated centuries-old practice, that the dominant environment made these ordinances absolutely necessary and inevitable if the Jew was to live among his neighbors. The *taqqanot* could be effective only for a limited period and had validity only in Christian and not Muslim countries.

One marvels at the persistence of Dr. Gordis in finding halakhic dynamism even in the revival, as he terms it, of "the Biblical concept of the *pilegesh*, the 'concubine,'" in the 13th century. He is finally forced to admit, however, that "by and large the Orthodox rabbinate declared itself powerless to deal with the problems of the *'agunah* ('the chained wife')." Even here, however, he finds the responsiveness of the Halakhah in the attempt of Rabbi Isaac Elḥanan of Kovno to persuade Jewish soldiers to issue a "conditional divorce;" or in the plan of Rabbi Lewis M. Epstein, whereby "a groom, before his marriage would designate specified individuals to serve as his agent for the issuance of a *get* (*minnui shelihut*)"; or in Prof. Saul

Lieberman's suggested procedure to append a codicil to the marriage contract. Dr. Gordis reserves his greatest enthusiasm for the decision of the Rabbinical Assembly to utilize the Talmudic principle, "Whoever contracts a marriage does so under the authority of the Rabbis." This principle makes it possible for a Rabbinic Court to annul a marriage retroactively. It would be gratuitous to probe how it is possible to express enthusiasm for a series of evasions just to preserve the concept that woman is property, chattel and, therefore, only the male, and not the female, can initiate divorce proceedings. The higher impulses of Talmudic Judaism would reject such a principle today. One may ask, however, whether the Talmudic principle which the Rabbinical Assembly utilizes has reality or substance in our contemporary society. Is the validity of a marriage really dependent on "the authority of the Rabbis" in present-day America? Furthermore, in the light of historic experience, should one not be at least somewhat concerned about granting such power to religious authorities? Haven't we learned that every potential abuse is, at one time or another, actualized? It is difficult to understand how a group of enlightened religious leaders can resort to such trivia instead of declaring honestly and forthrightly that in this second half of the twentieth century the woman is human, equal, and entitled to her fulfillment every iota as much as any male.

"Ultimately, however," Dr. Gordis states, "Life is the determining factor and from its decision there is no appeal." He finds evidence of the "responsiveness of the Halakhah to the popular will" in the "introduction of family pews" in modern America, "not merely in Reform congregations but also in Conservative ones." "Orthodoxy in America has also yielded on this point . . ." (Dr. Gordis apparently prefers to disregard the responsa of my revered teacher, Dr. J.B. Soloveitchik, and of Rabbi Moshe Feinstein on the subject.) Prof. Gordis emphasizes that though "Conservative leadership has never 'sanctioned' mixed pews, they are an expression of the popular will which has been allowed to prevail . . ." Is it legitimate to inquire why, indeed, the Conservative leadership has not written a responsum on the subject? Where is the dynamic halakhic leadership? The traditionalist cannot be relied on; but is it too much to expect that a Conservative rabbinate would have the courage to face contemporary reality and speak in clear, unambiguous terms? Where is the method of *Mishnah*, even for Conservative rabbis?

If, as Prof. Gordis suggests, ". . . how the people conduct themselves" is a factor in defining the imperatives of Judaism, then the course that the serious, committed interpreter of the Jewish way must pursue here and now is crystal clear. The overwhelming majority of the Jewish community — "Catholic Israel" — has rarely, if ever, spoken with a clearer voice: Traditional Halakhah is a calcified distortion of our historic faith. Most of the concerns and the methods of those who have assumed the role of authoritative interpreters of Halakhah are irrelevant to contemporary

Jewish life. The grievous error today is not "to interpret Torah contrary to Halakhah" (*megaleh panim batorah shelo' kehalakhah*), but, rather, "to define Halakhah contrary to Torah" (*megaleh panim behalakhah shelo' ketorah*). For at the center of our commitment as Jews is Torah, an open, developing, living Torah. Our reliance is not a static, monolithic Halakhah, the endless minutiae which absorbed within themselves and largely reflect antiquated social views and institutions, archaic science, transient myths, dated "tool-worlds" and fluctuating historic circumstance. The living Torah which we would place at the center of our lives and to which we would devote our efforts is that Jewish continuum, the essential Jewish ethos diffused throughout the totality of Jewish experience — often discernible only as a tendency, an attitude — tentative, elusive, discovered only after arduous struggle and search.

The living Torah emerges dialectically — not as a series of suspended, theoretical absolutes, but as an ongoing dialogue within the heart of the religious consciousness of the committed, aware Jew; a dialogue between the godly glimpsed by our fathers and appropriated by us, the possibilities of the present and our prayerful reach for the not-yet. Torah emerges as we stand firmly rooted in the present and engage our moorings and our reach in continuous dialogue — a serious, searching process which must be renewed daily. The result of this process is the imperative, the *mizvah*, the call "thou shalt and thou shalt not" which gives no rest until it evokes the response: "I must because I am a Jew; I can do no other."

Is it not about time that the representative leaders of a creative, responsive Judaism abandon their apologetic stance of the inauthentic suppliant pleading for legitimacy and acceptance and, with well-earned and justified confidence, go about their task of "returning the crown to its ancient glory," by reestablishing the Oral Law with its *Midrash* and *Mishnah*? At stake is the future of Judaism and the Jewish people.

Halakhah and the Role of the Community

LEONARD S. KRAVITZ

THERE WAS A TIME WHEN ALL THE RESPONSES to the question of the role of Halakhah in Jewish life were institutionally predictable. One could expect the Orthodox to say that, as the Halakhah was Divine in origin, it had to be unchanging in practice; one could expect the Reform to say that whatever its origins, the unchanging quality of the Halakhah in practice required that it be jettisoned; and the Conservatives could be expected to argue that the Halakhah reflected continuity and change and, hence, had to be both maintained and modified.

At present, it would seem that all three parties of American Judaism are interested in continuity and change: Orthodox scholars have evinced great creativity in the field of medical ethics; Reform Judaism has shown great interest in the Halakhah, *vide* the enormous creativity of Dr. Solomon Freehof as reflected in his many volumes of Reform Jewish responsa; Dr. Robert Gordis in his books and in this article, to which I am reacting, has demonstrated the dynamic nature of the Halakhah. The burden of this study is that as Halakhah has changed in the past, so it needs change in the present, and will change in the future.

While accepting the notion of halakhic change, one may differ with Dr. Gordis' evaluation of its "principles and procedures." Indeed, one may have a different view of the very nature of the Halakhah — and, with that, a different view of the problems of further halakhic change.

It seems to me that the authority of the Halakhah of which Dr. Gordis speaks did not derive merely from a system of texts and their interpretations; it derived, rather, from the reality of the Jewish group existing as a more or less autonomous entity. As long as the Jewish group, whether as a people or as a community, whether within or without the Land, was, in some degree, self-governing, the Halakhah was its instrumentality. The Halakhah was law. As law it had sanctions. They were: in the life to come, Gehinnom; in this life, fines, lashes, imprisonment, excommunication, even death.

As the social fabric covering Jewish life, the Halakhah changed as Jewish life changed. As the Jewish People in the land passed from being shepherds to being farmers to being artisans and merchants in cities, perforce that fabric had to be tailored to meet new styles of life. If Dr. Gordis is correct, and I think that he is, about the original meaning of *pi sh'nayim*, then it may well be that the rabbis changed that meaning because the original Biblical purpose of insuring that a land bequest would be large enough to be economically feasible no longer made sense in a

LEONARD S. KRAVITZ *is professor of Midrash and Homiletics at HUC-JIR, New York.*

mercantile society. Similarly, one might argue that Hillel's *prosbul* was enacted because the Biblical situation of borrowing as disaster relief for farmers no longer made sense to the city situation of borrowing as capital formation for merchants.

As the Jewish People outside of the land became more and more a merchant community, Jewish law developed to meet the needs wherever they might be found. Essentially, one legal system embraced all of the Jewish communities of the medieval world while it traversed the boundaries between the Moslem and Christian worlds. The Halakhah did change to meet new situations, as, for example, the development of the concept of *stam yainam* which made possible Jewish trade in "non-Jewish" wine, all the while prohibiting its being drunk by Jews.

It needs to be stressed that whatever halakhic creativity obtained in the medieval period, it was creativity of, and for, the community. The preservation of the Jewish community was the concern of the Halakhist not only with regard to the matter of birth control, as Dr. Gordis has shown, but with regard to matters as diverse as martyrdom and the permission of shaving for court Jews. Group survival was the desideratum for medieval Jewry as it had been for Biblical and Rabbinic Jewry; it could be no other way, for the Jew was viewed, and viewed himself, as being a member of a specific group separate by law, the internal law of the Halakhah and the external law of the society in which the Jewish group resided.

Emancipation was to change the nature of the Halakhah, just as it changed the nature of the Jewish community. With emancipation, the Jewish community lost its semi-autonomous status and became a volunary association. The individual Jew became, at least in theory, a citizen of the nation-state. As citizen, he was bound to the legal system of the general society. Reduced to the corners of life into which the general law did not choose to intrude, the Halakhah became "religious" law, that which the individual Jew chose to observe. Shorn of sanctions, the Halakhah could not compel compliance.

Still, the Halakhah had the power to move if only to the level that the individual Jew wished to remain part of the Jewish group. So long as Jews lived in the same area, so long as they had the same status, pursued the same occupations, so long as the Jewish neighborhood was the ghetto de facto if not de jure, so long forces of social interaction might do, in part at least, what sanctions had done. So one might say that a particular societal position made for a sense of Jewish identity and Jewish identity made for a certain level of Jewish practice, a kind of Halakhah, as it were.

Differences in the definition of the Jewish group account for the anti-halakhic posture of early Reform Judaism and the transition toward a more halakhic stance in later Reform; the notion of Jews as co-religionists contended with the notion of Jews as members of a people. By 1937, Reform Judaism had given official utterance to the view of Jewry as

a peoplehood in the Columbus Platform. Its opening sentences speak of Judaism as the religion of the Jewish People and its closing passages describe Judaism as a way of life involved with a whole round of observance.

Thus, a reciprocal relation between peoplehood and Halakhah may be seen: to the level that Jews see themselves as members of a people, to that level they will be engaged, consciously or unconsciously, in doing things that are "Jewish." To the level that Jewish observance becomes important to Jews, to that level Jewish identity will be reinforced.

Halakhah, therefore, becomes a symbol of Jewishness. Halakhic change also takes on symbolic importance. Leaving aside the consideration of further halakhic change for socio-economic reasons, the "new ethical perceptions" which may militate for halakhic change may reflect only a particular view at a particular time. Like the medieval attempt to revive the notion of the *pilegesh*, they may tell us more about those proposing change than about the reading of the Tradition. Simply put: if the Halakhah now must be motivated, then it must be motivated for the "highest" reasons; if the Halakhah is to be changed, then it must be changed for the "highest" reasons. However, not all will agree what those reasons are and whether they are the "highest."

Thus, we have a problem with Dr. Gordis' view of halakhic change. For him, such change has three elements: past tradition, present situation, and spiritual and intellectual leadership to relate the first two and make changes. Some immediate questions come to mind: who evaluates the first, who judges the second, and who is fit to be regarded as belonging to the third.

Two issues, one of death and one of life, will make clear the problem of "procedures" of change. I refer to capital punishment and birth control.

Ordained in the Torah, prescribed by the Mishnah (I note that Dr. Gordis, like so many others, did not quote the rejoinder of Rabbi Simon b. Gamliel to Rabbis Akiva and Tarfon, "Indeed, they would have multiplied the shedders of blood in Israel" — *Makkot* 1:10), accepted by the Gemara, to be found in Codes, (one is reminded of Maimonides' statement in the *Mishneh Torah, Book of Judges, Hilkhot Sanhedrin*, Chapter 20, Halakhah 4, warning the court not to be lax in the execution of a murderer and prohibiting the court from saying, "The one has been killed, what benefit is it to slay the other" — Rather, they should fulfill the Torahitic commandment, "Your eye should not pity . . ."), carried out, in fact, by medieval courts, at present on the Israeli lawbooks at least for war criminals and carried out in the case of Adolph Eichmann, capital punishment has long been an element of Jewish jurisprudence and, therefore, has long been acceptable to Jewish sensibility. It seems to be acceptable to the general sensibility; polls have shown that capital punishment is acceptable to a vast number of the American people, perhaps to a majority. However,

studies would show that it is not acceptable to a particular stratum — college-educated, upper middle class.

Upon what basis could one argue that new ethical insights precluded it? The texts hardly argue for it; the principle of *middah kineged middah* which Dr. Gordis adduces seems not to have been known to Maimonides; the society at large does not seem to be the source of our new insights. It may well be that the identification with a particular stratum in the general society is the source of that particular view.

Now the question of capital punishment is not a Jewish question in the United States. In no way do Jews control or apply it. Whatever force the Halakhah may have, it is in terms of testifying before legislatures or advising congregants. It is for us *non-operative Halakhah*. What might be operative Halakhah is the matter of birth control and that is, indeed, a Jewish question.

If it is with the college-educated middle class that capital punishment is disvalued, then it is with the same cohort that birth control is valued. We all know that demographic studies show that the Jewish community is not replacing itself. We know, too, that this is particularly true among college-educated middle-class Jews. Dr. Gordis indicated, in his sketch of the history of the Halakhah, that medieval Jewry, in the face of pogroms, stressed the importance of children and narrowed the acceptability of birth control. Were one to ask what should be the halakhic response to the Holocaust, one might conclude that there should be a stress on the having of children, and that, indeed, birth control should be proscribed or, at the very least, its acceptability be limited. To pose the question is to know the answer. If the real base of many contemporary moral judgments is outside of the Halakhah, it is vain to hope that "the spiritual and intellectual leadership" of our time would arrive at that conclusion.

There is a further question raised by the *ʿagunah* which touches upon Jewish identity and the procedures of halakhic change, viz., what is the nature of the Jewish community that is assumed? As Dr. Gordis has indicated, it was the change in the autonomous status of the Jewish community which created the problem; *kofin ʾoto*, to force a reluctant husband to grant his wife a *get* would, at the least, bring about a charge of assault and battery. Yet it was the change in the community which opened up other options: the lack of the *get* does not necessarily create an *ʿagunah*. How many women in present-day Conservative congregations would feel themselves unable to remarry if they had a civil divorce and could not get a Jewish divorce? How many Conservative rabbis would feel that such a woman had committed adultery by such a remarriage? How many Conservative rabbis have asked their Reform colleagues to perform weddings for congregants who could not get a *get*?

On the other hand, which Orthodox woman would feel that the problem has been solved by a Conservative enactment? How many Reform Jews would be convinced that a Conservative casuistic change in the

ketubah solved the inequities in Jewish divorce better than the Reform enactment of 110 years ago (the Cleveland Conference of 1869) which delcared that a civil divorce would suffice?

Moreover, alas, we live in an age when many young couples, and Jews among them, seemingly have solved the problems of divorce by living together without marriage. One wonders whether such couples would be touched by a change in the *ketubah*.

Such living together (and inter-marriage) show a loss in the power of the taboos of the community and with that a loss of the strength as well as a fragmentation of the sense of self of the Jewish community. This leads to a final conclusion: in the deepest sense, "sociology" and the Halakhah are in real conflict. That conflict exists beyond any issue of specific halakhic change because the Halakhah, however defined, symbolizes the Jewish group qua group. In our benedictions we have said and do say, ". . . Who has sanctified *us* and commanded *us*." Much of modern life, to the level that pop-culture touches the American Jewish community, promotes the individual qua individual. The stress and the focus upon his/her needs and/or desires, coherent with a capitalistic, technological, *Gesellschaft* society, are ultimately destructive of the group values of Judaism.

Therefore, the question is not how do we modify the Halakhah as much as it is how do we maintain the Jewish group. How we we make of an aggregate of Jews a *Jewish* community? How do we give Jews a sense of Jewish peoplehood? How do we infuse them with Jewish values? In sum: how do we create Jewish identity?

As that identity is created and perpetuated, so the Halakhah, its symbol, will develop and be perpetuated. Thus, the Halakhah will be both permanent and changeable. As the Jewish People exists, it will be permanent; as the Jewish People undergoes change, it will change. We are in Dr. Gordis' debt for reminding us of the two-fold nature of the Halakhah.

Who is the "Author"?

ALVIN J. REINES

NO SUBJECT PRODUCES SHARPER DIVISIONS among contemporary Jews than that of the Halakhah. Dr. Gordis, in his article, "A Dynamic Halakhah: Principles and Procedures," displays great courage as well as erudition in pursuing so thorny a problem. The term Halakhah, which has more than one meaning, will here be used as employed by Dr. Gordis, to refer to the entire legal part of the Jewish tradition not contained in Scripture, which includes ritual, domestic relations, civil, and criminal law. The Halakhah is assumed, traditionally, to have been transmitted orally until first written down in the Mishnah (circa 200 C.E.), and has since that time been explicated in a variety of forms, in commentaries, codes, and responsa. The thesis of Dr. Gordis' article is that the Halakhah is "open" and "dynamic," which, I take it, means that the Halakhah is receptive and responsive to new ideas and influences, and is, therefore, characterized by continuous change and advance.

In approaching the article, the question that must first be resolved is Dr. Gordis' purpose in writing it. The answer seems evident that it is not simply to present a scholarly exposition of the nature of the Halakhah, but, rather, to propose and justify a course of action for the present, namely, that just as the Halakhah in the past has changed to meet new economic, political, social and cultural conditions, so it can and should now meet such new conditions dynamically. Implied, rather than explicitly stated by Dr. Gordis, is the recognition (shared by many) that the Jews are today living in a period of greatly changed conditions from times past when the Halakhah held undisputed sway over Jewish life, and that the Halakhah must, therefore, advance, to meet the new needs, particularly in the areas of ritual and domestic relations law, that these changes have produced. If this understanding is correct, then it must be stated, at least in my view, that Dr. Gordis has taken only the very first steps toward achieving this goal. The fundamental reason for this is not to be found in what he has written, but in what he has left unsaid. What I mean is amplified in the following four observations.

1. Dr. Gordis does not state who, in his opinion, "authored" the Halakhah. This point is critical for the basic thesis that he wishes to present: that the Halakhah is open and dynamic. Historically, Jews have taken two general positions regarding the authorship of the Halakhah: that "God" is the author (the term "God" as used here refers to a theistic, absolutistic deity); and that humans are the authors. (Jews who have maintained that "God" is the author include the Pharisaic and Orthodox

ALVIN J. REINES *is professor of philosophy at HUC-JIR, Cincinnati, Ohio.*

Jews; among those who have maintained human authorship are the Sadducaic and Reform Jews.) We may take it as granted that if "God" is the author of the Halakhah, then no human has the right to change any of its provisions. The reason is self-evident. If the perfect "God" is its author, the Halakhah must be accepted as perfect as well, — the perfect "God" would not create an imperfect "Law." Accordingly, since the "Law" is already perfect, it makes no sense for any changes ever to be made in it, since any change in perfection can be only to imperfection. On the other hand, if humans created the Halakhah, and humans clearly are always fallible, then it follows that the Halakhah is fallible as well. Accordingly, a human Halakhah may be presumed to require periodic reexamination and change. New and superior intellectual and moral insights arise in the course of human history, and the Halakhah, if it is to be the highest expression of "Law," certainly must reflect and incorporate these insights.

Thus, the question of whether the Halakhah is "open and dynamic" is ultimately a theological question and can be decided only by a theological answer. If "God" authored the Halakhah it cannot be changed. If, however, humans wrote the Halakhah, then other humans have the right, if not the duty, to review and change its provisions periodically. Had Dr. Gordis decided the question of authorship at the outset of his article, the basic point of the article would have been immediately determined. A Halakhah authored by "God" cannot be open and dynamic; a Halakhah authored by humans can, and should, be.

2. The objection might here be raised that Dr. Gordis did, at least by implication, resolve the question of the authorship of the Halakhah. For he does cite a number of instances in which halakhic rules and regulations were changed by Jewish religious authorities. If there were changes made in the Halakhah by humans does this not mean, by the logic described earlier, that the Halakhah must be human in origin, since we may assume that no Jewish religious leader would presume to alter "God's" revealed commandments? Unfortunately, the instances that Dr. Gordis cites are not definitive. That is to say, an argument can be made that the changes in the Halakhah referred to are not "changes" at all, but optional courses of action allowed for and prescribed by the Halakhah itself. Consequently, even though Dr. Gordis shows instances of ostensible change in the Halakhah, these in no way demonstrate the real and substantial changes that would unequivocally prove human authorship.

3. Determination of whether the Halakhah is of divine or human origin would resolve another difficulty in Dr. Gordis' article. This is his apparent assumption that the Halakhah has authority over all Jews, that is to say, all Jews have an obligation to obey its laws, particularly the ritual and domestic relations regulations which, in Orthodox and Conservative Judaism, are primarily operative in our time. Surely, a reasonable case must be made to support the position that the Halakhah has such authority before any Jew has an obligation to obey it. No such case is set

forth by Dr. Gordis. The reason is, of course, that the question of the authority of the Halakhah over Jews is intrinsically related to the question of the authorship of the Halakhah. If "God" is the author of the Halakhah and has commanded the Jews to observe its laws, then we may all agree that there is an obligation on the part of the Jews to observe them. If humans, on the other hand, are the authors of the Halakhah, no matter how profound these humans may be, the Jews are still not obliged to obey it. For no humans have the right to impose their personal religious rules and regulations on others. Succinctly stated: "God" ipso facto has authority over the Jews; Jews over their fellow Jews do not.

4. Setting aside the theological question of the authorship of the Halakhah, we may turn our attention to still another problem. Dr. Gordis says that it is authoritative and at the same time open and dynamic. Several principles are enumerated which are said to guide the changes in the Halakhah and thus enable it to be open and dynamic. The difficulty that arises here is this: do not the principles of change which Dr. Gordis lays down, when applied consistently, undermine the stability of the Halakhah to the point where it cannot exercise authority? If persons, by carrying the principles of change through to their logical conclusions, can nullify or abolish any rules or regulations of the Halakhah that they wish, is not the authority of the Halakhah completely subverted and its character as "law" entirely destroyed? If so, then is not Dr. Gordis' notion that the Halakhah can be authoritative and, at the same time, open and dynamic, a practical, if not theoretical, impossibility? The following analysis of his principles of change, (they appear below in italics,) shows clearly the difficulties that arise when they are consistently applied.

a. *The Halakhah may be changed in response to new social conditions*. One new social condition is the acceptance by many persons of extra-marital affairs. Accordingly, the halakhic law against adultery (which has its origins in the Bible) may be abrogated.

b. *The Halakhah may be changed in response to new economic conditions*. One (relatively) new economic condition is the need to work on the seventh day. Accordingly, Shabbat on the seventh day may be abrogated.

c. *The Halakhah may be changed in response to new ethical insights*. One dramatic new ethical insight is the right of women to equality. Accordingly, the notoriously discriminatory laws of the Halakhah against women may be abolished. Jewish women can be given the right to divorce their husbands if they wish, instead of the husbands being the only ones who can initiate divorce proceedings and give a *get*. The status of *'agunah* can be abolished by instituting an "Enoch Arden law," which permits a wife to be divorced or to remarry without liability after an unexplained absence by her husband for a set period of time.

d. *The Halakhah may be changed to strengthen Jewish survival*. Great numbers of Jews find the Halakhah an obstacle to a meaningful personal Jewish existence. For them, the Halakhah may be abolished.

e. *The Halakhah may be changed in response to the popular will.* Probably the majority of Jews, certainly in America, do not find the dietary laws meaningful. Accordingly, the dietary laws may be nullified.

Of course, Dr. Gordis has no intention of having the principles of change he lays down used to abolish the Halakhic provisions to which they have been applied above. Yet, if the changes in the Halakhah that these principles can effect cannot be clearly stated, they are nothing but mere historical abstractions without relevant and significant contemporary application. Idle abstractions do not make the Halakhah "open and dynamic." Indeed, the inability of the Halakhah to change is clearly seen in Dr. Gordis' own description of the tortuous but fundamentally unsuccessful methods that have been developed to deal with the problem of the *'agunah*. The inequity and immorality of keeping a woman an *'agunah* is clear to every modern person. The inability of the Halakhah to provide an ethical solution to her problem symbolizes the Halakhah's paralysis, generally, in the face of the challenges and conditions of contemporary life.

Where does all this leave us? Is the dialogue that has been initiated in these pages of JUDAISM now over? I would hope not. I believe that Dr. Gordis, in presenting his point of view regarding the Halakhah, and by allowing JUDAISM to invite comments from persons representing a spectrum of differing positions, has performed a heroic act for the general Jewish community. There is little question that Jews are under siege by the modern age and that our very survival is at stake. It is also clear that without a relevant and significant religious Jewishness, the Jewish community has little chance to endure. But which form will that religious Jewishness take? This question, I believe, must ultimately be resolved by the community itself. Personally, as I have argued elsewhere, I do not think that halakhic Judaism is able to meet the ultimate religious needs of ever-increasing numbers of Jews in our time. Halakhic Judaism is chained to the past; its machinery of change is practically non-existent, and its fallible human origins are, upon careful analysis, all too clear. It is in a non-halakhic Judaism of freedom and continually creative change that I believe the future lies. Still, it is critical to bear in mind that if the Jewish community wishes it, there is room for halakhic and non-halakhic Judaisms to exist side by side, not only in friendship, but in mutually enriching dialogue. Can halakhic Judaism change to the point where it will accept and recognize non-halakhic Judaisms? Certainly, non-halakhic Jews have much to learn from Dr. Gordis, whose massive erudition may still prod the Halakhah to contemporary responsiveness.

What is most important, however, is that the Jewish community survive; and this can occur, I believe, only if the community has access to all forms of religious Jewishness, halakhic and non-halakhic alike. JUDAISM has begun this life-giving and unifying process of exposure. We shall all be the poorer if it does not continue.

The Halakhah, Past, Present and Future: a Reply to the Responses

ROBERT GORDIS

IT IS NOTEWORTHY THAT BOTH RABBI IMMAnuel Jakobovits and Rabbi Emanuel Rackman declare that the basic thesis of the paper is unassailable. They agree that the Halakhah throughout its past history has shown itself to be responsive to life, reckoning with new social, economic, political and cultural conditions and taking new ethical insights into account. However, Rabbis Jakobovits and Rackman both go further. They insist that contemporary Halakhists demonstrate the same qualities today and that the dynamic of the classic Halakhah may be found operative in their decisions. Thus Rabbi Rackman writes: "The Halakhah does respond to contemporary problems; it does cope with changed conditions; and it does not regard itself as the antagonist of the world of human nature."

Rabbi Jakobovits is even more emphatic: "The vast output of Rabbinical responsa during the post-War period (running into thousands of original verdicts on the most diverse modern questions) bears monumental testimony to the dynamic character of Jewish law and its continued evolution."

I wish I could agree with their assessment of the present situation. But as I view the status of the Halakhah in the State of Israel, where the Orthodox religious Establishment is able to enforce its will in many crucial areas of law, I recall the succession of struggles, denunciations and unseemly controversies both between the Chief Rabbis and with those who totally deny their authority. A familiar question arises, "If it is so good, why is it so bad?"

It is noteworthy that neither Rabbi Jakobovits nor Rabbi Rackman has offered a list or even a sample of the halakhic decisions by official spokesmen that reflect this alleged responsiveness to contemporary problems and insights. Perhaps one should adopt the attitude that emerged in a discussion on the efficacy of prayer. "I prayed to God to make me rich and God did not answer me," said the non-believer. "Oh, yes, He did," the believer replied. "The answer was 'No!'"

Moreover, a little later in his paper, Rabbi Jakobovits writes: "Nowadays, it must be conceded, the general attitude of the Halakhah's custodians is predominantly ultra-conservative. . . . The "status quo" is today's sacred cow in Israel's religio-political set-up no less than in rabbinical orientation."

As for Rabbi Rackman, the problems that he has encountered in

attempting to establish a modicum of legitimacy for his more liberal approach are common knowledge. He spent many years in the United States defending himself against attacks from the right, with no visible allies on the horizon. The press recently reported that he was unable to find one Rosh Yeshiva in Israel who would undertake to head the school in Bar Ilan University in which the students would study Talmud for most of the day and secular studies in the evening.

One looks in vain for decisions of contemporary Halakhists in Israel dealing with problems of marriage and divorce, intermarriage, conversion, the nature and use of electricity, civil marriage, the rise of pre- and extra-marital relations, homosexuality, and the status of women. There has been a deafening silence on such ethical issues as integrity and responsibility in business and in labor, in government and academia, yes, and in organized religion as well. Nor has the voice of "religion" been heard on war and peace, the Jewish attitude toward the Arabs in Israel and outside its borders, or toward the Druzes and the Falashas. Equally untouched have been the basic issues of social and economic justice for the underprivileged, religious pluralism and freedom of conscience.

I am not suggesting, nor do I favor, "permissive" or "lenient" decisions on all issues — only that there be manifest an awareness of their existence and a sympathy for the human beings involved in them.

Evidently realizing the weakness of the effort to demonstrate the sensitivity of contemporary Halakhists to the modern world, Rabbi Rackman has discovered a "principle of polarity" in the Halakhah. One principle seeks to "have Halakhah respond to the needs and insights of the world." The other seeks nothing less than "to rebuild the world and transform human nature by keeping the Halakhah static and unbending. It is in this revolutionary guise (or disguise) that Rabbi Rackman seeks to clothe the most extreme right-wing elements. I doubt that they themselves, or many others, would recognize themselves in this "job description." Are these luminaries, implacably opposed to any contact with the modern world or general education, dedicated to transforming human nature and rebuilding the world? Most unsophisticated observers would see in them quite the opposite — a group determined to shut out the world and enclose themselves ever more tightly within their own restricted confines, manifesting little or no concern or sense of responsibility for what goes on beyond their own boundaries. It is also significant that Rabbi Rackman attributes this constricting tendency not to the Mishnaic age, incomparably the most creative period in Rabbinic law, nor to its greatest and most influential figures, but to the post-Mishnaic and Talmudic eras.

Rabbi Rackman's apologetic skill appears on another subject as well. He declares that the moral principle of *ṣeniyut*, "sexual modesty (for women)" is served by the *status quo* in Israel, which permits women to testify as witnesses in the secular courts but, in accordance with the Halakhah, forbids them to testify in religious courts. One is at a loss to see

how a woman's testifying in a religious court would be a greater act of immodesty than a similar act in a secular court.

Rabbi Rackman states that from my writings he once learned of the statement of a famous scholar. Let me add another. James Harvey Robinson, the American historian, declared, "Every event in history has a good reason and a real reason." Rabbi Rackman has proposed a good reason, but there is also a real reason. The religious Establishment was unable to carry the day in the secular courts over the ethical demands and practical needs of society as a whole, but they were able to retain a morally dubious stance in the religious courts on the matter of women as witnesses because here their power remained intact. This was possible thanks to the "swing votes" that they command in the Knesset to which the Labor Government, unwillingly, and the Likud administration, willingly, capitulated.

The sensitivity to the world and the courage and creativity to deal with it tended, *mutatis mutandis*, to decline as a result of worsening conditions for the Jewish people after the Greco-Roman period and during the Middle Ages, as is explicitly recognized in my paper. Nevertheless, as I point out, even in the Middle Ages innovations continued to be introduced, such as the prohibition of polygamy, the creation of the *Simhat Torah* festival, the mourner's *Kaddish*, the *Yizkor*, and the Bar Mizvah rite.

The tragedy — and ultimately the peril — that confronts the Halakhah today is that, in a world that has changed more within half a century than in the preceding three hundred years, this dynamism has virtually come to a standstill. In fact, in many instances, halakhic authorities today have retrograded from the position achieved earlier. There are, to be sure, individual voices who speak out against this petrifaction of the Halakhah. By and large, they remain voices crying in the wilderness, generally ignored or worse.

It is true that in every period there are liberals and conservatives, and the tension between them is, indeed, healthy and necessary. As I stated, "This does not mean even remotely that we must always yield to the spirit of the age." But it is noteworthy that while the school of Shammai scored some noteworthy victories over their opponents, it was the school of Hillel that set the course of Rabbinic Judaism. Rabbi Eliezer ben Hyrcanus, the arch conservative, commanded the respect of his colleagues for his piety and his learning, but they did not abdicate their responsibility and did not hesitate to establish the Halakhah against his determined opposition. Today, the balance has shifted with a vengeance; the right-wing, to put it mildly, manifest no respect for those who differ with them, even or especially within the Orthodox camp. Their technique is simple and effective — whoever disagrees with them is *ipso facto* non- or anti-halakhic and, therefore, outside the bounds of legitimacy. Those who believe in the vitality of a dynamic Halakhah must show no less zeal for their cause.

•

While Rabbis Jakobovits and Rackman, writing from an Orthodox perspective, are concerned to underscore the dynamic character of the Halakhah, not only in its classic periods in the past (the thesis of my paper), but to insist that the same dynamism is operative today, Dr. Marvin Fox, on the other hand, is eager to stress the conservative and static elements in the Halakhah. Basically, his criticism is twofold:

(a) My paper does not do justice to the conservative tendency in the Halakhah and concentrates on the element of development and change. Undoubtedly, the static aspects of Jewish law would need to be discussed in a comprehensive history of the Halakhah. However, this was not the object of my article. Besides, it is hardly necessary to demonstrate that, by its very nature, every legal system tends to be conservative because it enshrines the attitudes arrived at in the past. What is important to demonstrate is that Jewish law is not a mass of outworn prohibitions and artificial disabilities remote from life and unresponsive to human needs and aspirations. It is no news that there were contemporaries of Rabban Johanan ben Zakkai at the time of the destruction of the Temple who objected to his bold transfer to Javneh of many of the prerogatives of Jerusalem. What is important is that Rabban Johanan had the courage to break with the static pattern from the past, when radically altered conditions required it and that his ideas prevailed. Finally, the cutting edge of the law lies not in the defenders of the *status quo ante*, but those who discern and help to fashion the shape of things to come. The great judges of the United States Supreme Court were Marshall, Brandeis and Warren, whose loyalty to the Constitution was not inferior to that of their more conservative colleagues, but whose vision and insight were far superior.

(b) Dr. Fox also makes other high demands upon the paper. He wishes to have the criteria spelled out for determining "what is dangerous and ill-advised in the new society on the one hand, and what is ethically sound, religiously true and pragmatically valuable on the other." I respectfully demur. Enunciating the principle is all that can legitimately be expected of one paper, not an analysis of contemporary society with all its complexities.

As an instance of the conservative tendency of the Halakhah, Dr. Fox cites the codification of the laws regarding the Temple service in the Mishnah and in Maimonides. Then he concludes: "The codified Halakhah is far more than just a response to life. It is a set of ideal structures which set a standard according to which Jewish life is to be shaped." *Per se*, the statement is unexceptionable, but it is hard to see how the minutiae concerning animal sacrifices and the laws of purity that were operative only in the Temple were preserved in order to shape life during the nineteen hundred years of exile. A less philosophical, but more convincing, explanation is at hand. The Mishnah and Maimonides preserved these detailed regulations because of the firm faith that the Tem-

ple would be restored and these regulations would, therefore, be of direct practical significance.

The two instances in the practice of Rabbi Simeon ben Shetah that Dr. Fox adduces he interprets correctly, but he draws an erroneous conclusion. The hanging of the eighty women as witches was an extra-legal, one-time procedure which he felt to be justified. His inability to convict the murderer on circumstantial evidence represented the permanent and normative law.

With regard to the discussion of *yibbum*, capital punishment, and the laws of inheritance of the first-born, lack of space precludes a detailed analysis. The reader must decide whether it is Dr. Fox's reading of the evidence or my approach that offers a more coherent and convincing interpretation.

I heartily endorse Dr. Fox's statement that there is need for continuing an intensive study and discussion of the history of the Halakhah. I would suggest only that if we operate on the theory that "we have a long way to go" before we act, we may find that there will be no need to act at all so far as the vast majority of Jews, including many of its potentially most creative and valuable members, are concerned. The Halakhah will have become merely another academic discipline, like the law of the ancient Romans.

•

Rabbi David S. Shapiro offers a detailed and reasoned critique of the thesis that Halakhah is dynamic and that it has responded both to internal stimuli and external conditions. That this is not the only approach possible to Orthodoxy is clear from Rabbi Jakobovits' and Rabbi Rackman's papers, both of whom have no difficulty in recognizing the dynamic character of the Halakhah. Rabbi Shapiro insists that the entire Oral Law is not only implicit in the written Torah, but is explicit in it, so that every midrashic interpretation of the Rabbis is the literal meaning of the Biblical text. This is, of course — and I use the word in no pejorative sense — the fundamentalist rationale for Orthodox Judaism.

Rabbi Shapiro's approach, which is today dominant in Israel, is dependent upon a refusal to examine the implications of the position and upon drawing illegitimate conclusions from it. Thus he writes: "The Rabbis throughout the generations were firm believers in the Divine origin of the Torah and would not dare to tamper with the slightest jot or tittle of it."

Those who adopt this position do not stop to inquire what the meaning of the phrase "the Divine origin of the Torah" is and how man relates to God in the process of revelation. Undoubtedly, there were Sages in the Talmudic period who shared a viewpoint very similar to that of Rabbi Shapiro. But this is not the only position in classical Judaism. Rabbis of the greatest eminence did not hesitate to view Halakhah as the result of the

interaction between a Torah divine in origin and then entrusted to man's capacity to reason.

The Talmudic rabbis rarely engaged in abstract theological discussions, but this is undoubtedly the concept underlying the famous incident of the "stove of *ʿakhnʾai*" (B. *Baba Meẓia* 59b). Here the conservatively minded Rabbi Eliezer ben Hyrcanus forcefully presented his view on the question under discussion, but none of his colleagues agreed. To justify his position he called upon a series of three miracles, each of which duly took place. But his colleagues remained unconvinced. He then turned to Heaven and asked that a heavenly voice, a *bat kol*, pronounce judgment, whereupon it was heard to say, "Who are you to differ with Rabbi Eliezer, for the law is according to his view on every question." Rabbi Joshua then stood up on his two feet and said, "The Torah is not in heaven." "This means," said Rabbi Jeremiah, "that the Torah has already been given on Sinai. We pay no attention to a heavenly voice, for You have already written at Sinai in the Torah that we must follow the majority." Rabbi Nathan then met the Prophet Elijah and he said, "What did God do in that hour?" He answered and said, "He smiled and said, 'My children have overcome Me.'"

There was also a recognition in the Talmud that the successive generations of scholars were not merely repeating traditions and decisions from the past, but were revealing new and unfamiliar aspects of the Torah. This is clear from the Aggadah, not devoid of humor, that tells of Moses sitting in Rabbi Akiba's schoolroom and finding that he did not understand what Rabbi Akiba was expounding. Moses was deeply distressed until he heard Rabbi Akiba, at the conclusion of his lecture, declare, "This is the law from Moses on Sinai." Thereupon Moses regained his composure (B. *Men.* 49b).

To speak of the dynamic of the Halakhah as "*tampering* with a jot or tittle of it" is a form of invective which assumes that which is to be proven.

Rabbi Shapiro is, of course, unable to deny that such important Biblical ordinances as the *ʿeglah ʿarufah*, "the sacrificial calf" and the *sotah*, "the wayward woman," were abolished by the Rabbis. The Mishnah uses the verb *bittel* "abolish, suspend," and explicitly indicates that the change was occasioned by new social and cultural conditions. Rabbi Shapiro claims "this is not a case of abrogation but of application." I suggest that his contention may save the dogma, but it violates the plain meaning of the Rabbinic text.

In order to support his claim that the midrashic interpretation is identical with the literal meaning of the Biblical text, he argues that a legal text will contain nothing unnecessary, so that it is legitimate to draw inference from any superfluous language. But even a legal text will make its meaning clear in dealing with capital cases. He argues that the phrase, "He that is to die is to be put to death" (*yumat*), means that the culprit must explicitly declare himself ready to die before committing the crime. This is

excellent midrash, but it is doubtful Biblical exegesis. Actually, the Rabbis, even though they engaged in this type of minute interpretation, were well aware that "the Torah speaks in the language of men" (*Ber*. 31b and often) and "a Biblical verse must not be severed from its literal meaning" (B *Shab*. 63a). Hence, Biblical style will follow idiomatic Hebrew usage and often includes repetitions and other stylistic traits.

In responding to my discussion of the ban against polygamy by Rabbi Gershom, Rabbi Shapiro quotes Professor Baron as stating, "Gershom's ordinance was no innovation in European life." That is precisely what my paper argued. But if the official prohibition on polygamy was not a response to the Christian environment, and Rabbi Shapiro is right, why was it not put into practice in Islamic countries?

I heartily endorse Rabbi Shapiro's sentiment that the Torah was given to man to help him achieve a blessed life on earth and in eternity. The point at issue is not the goal, but the best means of achieving it in a world that does not stand still.

•

Rabbi Walter Wurzburger denies that "sociology" is an integral element in Halakhah. He argues that all the modifications and interpretations in Rabbinic law represent the end-products of a purely theoretical interpretation of Biblical texts uninfluenced by the factors — social, economic, political and cultural — that we have subsumed under the broad term "sociology." However, I believe that he surrenders his case when he declares "that a variety of halakhic positions such as *tikkun ha'olam*, 'the improvement of society,' *darkhei shalom*, 'for the sake of peace,' etc., mandate concern for factors varying with the vicissitudes of historic exigencies and changing value perceptions." This is precisely the gist of my argument. Undoubtedly, "insofar as the traditional Halakhah was concerned, no modifications could be introduced unless they conformed to the legitimate methods and procedures of the halakhic process."

As an Orthodox rabbi, Rabbi Wurzburger takes exception to the introduction of family pews in Conservative synagogues, which I cite as an example of bowing to the popular will. But he overlooks my reference to the establishment of *Simḥat Torah* in the post-Talmudic period, which has not been tainted by modernism. Nor does he make reference to the prohibition of polygamy.

Where the necessary changes can be introduced through the methods and procedures of Halakhic interpretation — and this is often, indeed, generally the case — this is surely preferable. But it is not always possible. In those circumstances, the categories of *taqqanot*, "positive enactments," and *gezerot*, "negative prohibitions," were invoked by Rabbinic authorities through the ages, all representing innovations which

could not, or could not easily, be validated by reinterpreting accepted texts.

Rabbi Wurzburger refers to "the unlimited authority accorded to Rabbinic courts in all matters pertaining to property rights which, however, does not extend to ritual matters." Here again I welcome his recognition of the power of the courts, but I cannot accept the limitation that he places upon it. I must mention once again the Rabbinic principle *kol hamekadesh*, "Whoever betroths a woman does it by the authority of the Rabbinical court," which therefore possesses the power of "annulling the marriage contract." Here the Talmud invoked broad powers, not only in property matters or even in ritual, but in the sacred area of marriage and personal relationships.

I have suggested that the practice of *hatra'ah*, the warning that must be given a would-be violator of a capital offense before capital punishment can be meted out, which the Rabbis introduced, is an indication of the fact that human life is regarded as sacred. Rabbi Wurzburger objects by pointing out that *hatra'ah* is also required before the penalty of flogging. But there is only a difference of degree involved. Capital punishment violates the sanctity of human life; flogging demeans its dignity. The Torah, itself, in ordaining flogging limits the number of blows that may be inflicted, insisting, "Forty stripes may be given him, but not more; lest, if one should go on to beat him with more stripes than these, your brother be degraded in your sight" (Deut. 25:3).

On page 27, he declares that my "analysis creates the impression that whenever culture collides with established halakhic opinion, halakhic jurisprudence sooner or later manages to accommodate itself to the dictates of socio-cultural realities." I have clearly indicated that the Halakhah is not *obligated* to surrender "to the spirit of the age." But it surely is clear that a Halakhah that refuses to reckon with the socio-cultural realities of Jewish life and human existence will sooner or later fall by the wayside, as did the law of the Sadducees, the Qumranites and the Karaites.

I regret that Rabbi Wurzburger characterizes the process of the interaction of tradition and life which I have documented in my study and which he does not refute in any important essential, as a "distortion of the text, a substitute and a cynical manipulation of the Halakhah." I realize that he writes out of a deep loyalty to Jewish tradition as he understands it. It is unfortunate that he is unable to respect the commitment of those whose approach differs from his own.

•

At the opening of his response, Dr. J. David Bleich informs us that his Judaism, his Halakhah and the Deity whom he recognizes are not identical with mine. In view of his self-assurance on these issues, I have no option but to agree. But that is not the issue at all. The question is, "Which

approach to Halakhah does greater justice to the phenomena under discussion." Dr. Bleich stands in a static universe and operates with *a priori* absolutes both in philosophy and in religion. He finds the possibility of growth, movement and change not only distasteful but profoundly unsettling.

He takes comfort in the thought that he is representing and defending the standpoint of the Sages of the Mishnah and the Talmud. But Dr. Bleich is under an illusion. Two men are on a river — one in a boat, the other on a raft. The former is aware, as he uses his oars, that he is moving. The latter may delude himself that he is standing still, but the current carries him along, nevertheless, and he has less control of his direction.

One illustration must suffice. Dr. Bleich quotes a famous passage in the Palestinian Talmud, as follows: "Even that which a conscientious student will one day teach in the presence of his master was already revealed to Moses on Sinai" (J. *Peah* 2, 4). He then paraphrases it: "All of Halakhah is inherent in the original revelation at Mount Sinai." Here Dr. Bleich has not been altogether fair with his readers. He has moved away from the Hebrew text in two particulars. The reading in the Palestinian Talmud does not say *niglah*, "was revealed," but *ne'emar*, "was said." Perhaps even Dr. Bleich finds it problematic to assume that every statement in Rabbinic literature was spoken verbatim to Moses on Sinai. But he then goes further. He abandons even this free rendition, "revealed," and speaks of the Halakhah as "inherent in the original revelation at Sinai." We may speak of an oak tree as inherent in an acorn, but an acorn and an oak tree are not precisely identical. We may regard an oak tree as "in the acorn" and, therefore, "integral to it," to use Rabbi Wurzburger's phrase. Or, we may think of the tree as an outgrowth of the acorn, the fulfilling of its original potential. One may opt for either view. The utilization of the canons of interpretation may be regarded as integral parts of the revelation itself, so that the Halakhist "merely" unravels the meaning of the Torah for his time. But what is important for a living Halakhah is not so much the precise theoretical formulation as the recognition of the process and our openness to its capacity for growth and development. Dr. Bleich will have none of this. The Halakhah is absolute, monolithic, unchanged, impervious to time and circumstances.

It is no derogation of the greatness of the Sages to point out that for them and, for that matter, for most generations until the modern age, the notion of change and development as a basic characteristic of all life did not exist. They did not deny change; they were unaware of it. They could conceive of the Patriarchs putting on *tefillin*, of Mother Rebecca lighting the Sabbath eve candles at the age of three, and David presiding over a Sanhedrin of scholars.

To maintain the same position today is not to ignore the meaning of history, but to reject it, and there is a vast psychological gulf between the two positions, as the virulence and passion of Dr. Bleich's exposition

clearly reveals. Dr. Bleich is mistaken in believing that he occupies the same standpoint as the Sages of the Talmud.

The issue is not whether the ancient Sages living before the emergence of a sense of history recognized the role of change in human life, but whether we can ignore — or pretend to ignore — what is patently clear today. Being unaware of the impact of historical change, the Talmud naturally does not see the *prosbul* as an abrogation of Torahitic law. Incidentally, I made the same point in my paper. But if, as Dr. Bleich insists in 1979, no change is involved, why did the *prosbul* have to wait a millennium and a half from the days of Moses until the period of Hillel to be put into effect?

With regard to each of the instances where Dr. Bleich attempts to deny the impact of social, economic and political conditions, as well as of emerging ethical insights, argumentation is basically fruitless. We operate from two different sets of assumptions and, in every case, the reader must ask himself which interpretation gives a more credible explanation of the phenomenon.

Philosophers have pointed out that finding the truth is an esthetic activity so that the simplicity and elegance of one theory over another determines its truth. This applies to Dr. Bleich's involved "explanation" of Rabbi Simon ben Gamaliel's decree concerning women's sacrifices of birds after childbirth, and his attempt to deny the obvious meaning of *pi sh'nayim*, where he tell us that "Scripture therefore means what the Oral Law says it means."

The prohibition of polygamy by Rabbi Gershom and his synod is explained by Dr. Bleich when he cites the responsum of the Maharam of Padua that "the financial burden of providing for the progeny of multiple wives was too great for impoverished Jews in the Middle Ages." This is an excellent example of the weakness of apologetics being made to do duty for analysis. First, before Rabbenu Gershom's *takkanah*, no man was *compelled* to marry more than one wife! Second, would not the same economic factor apply to poor Jews living in Moslem countries? Why was the prohibition not extended to them?

In his anxiety to oppose the treatment of halakhic norms in historical terms, Dr. Bleich identifies concubinage with promiscuity. That the institution was as prevalent among Ashkenazim as among Sephardim has never, to my knowledge, been maintained by anyone except him. Rabbi Jacob Emden, virtually the only Ashkenazic advocate of the institution, incidentally, went far beyond the Sephardic authorities who permitted it.

Since Dr. Bleich "defends" the Rabbis against the charge I never made, that they were gluttons and ignoramuses, I should, therefore, be grateful that I am being accused merely of being a Karaite, though, to be sure also guilty of intellectual dishonesty.

For Dr. Bleich there is only one issue, the acceptance or the rejection of the Eighth Principle of Maimonides' Creed paraphrased in the Prayer

Book, "that the entire Torah presently found in our hands is that which was given to Moses our teacher, may he rest in peace."

Maimonides needs no encomium from me, but he was formulating a dogma and dogmas always sound clear and unequivocal until they are analyzed. Thus, the Rabbis of the Talmud discussed the question whether the last twelve verses of the Torah relating Moses' death were written by Moses himself. In his own description of the Eighth Principle, Maimonides declares, "The real nature of that communication is unknown to everybody except to Moses, peace be to him to whom it came."

The basic issue for me is the nature of this process of communication between God and man. Were Moses and the Prophets passive scribes, copying words dictated to them by God, or were God and man both involved in the process, as is true in intra-human communication?

The Rabbis of the Talmud had more than an inkling of the human component in the divine-human encounter that we call Revelation. Historical scholarship has made it clear that the Prophets and Sages, as well as their successors, were no mere transcribers and transmitters of a text prepared beforehand. They were creative interpreters of a tradition going back to Moses, intelligent observers of the world about them, sympathetic leaders of their suffering people and, above all, conscious of their responsibility to keep Judaism alive and relevant in every age and under all conditions.

Even if we cannot all agree on these weighty issues that "stand at the high-point of the world," we should discipline ourselves to regard our divergences not as an evil but as a stimulus for the enrichment of Jewish life and faith.

•

Rabbi David Novak, like several of the respondents to my paper, has inferred that its purpose is to lay the groundwork for a defense of the ordination of women, which is at present a burning issue in Conservative Judaism.

It is a truism in the history of culture that advances in theory are generally stimulated by some practical concern, and so the "charge" is not unwarranted. I cannot resist the impish prophecy that the ordination of women will be an equally pressing problem in Orthodox Judaism in the twenty-first century. However, the question of the ordination of women needs to be decided on its own merits. I am, therefore, not disposed to argue with Rabbi Novak on that specific question. I shall confine myself to his effort to throw up a theoretical bulwark against this proposed change.

As he explicitly recognizes by his quotations from my paper, I favor selective change and not any and all changes for their own sake. Nevertheless, he distorts my position when he declares that it would seem that "arguments for resisting any specific change must be better than arguments for change itself. The burden of proof seems to be, in Profes-

sor Gordis' view, on the former." This is the direct opposite of my basic view that we always begin with a "bias" in favor of the tradition.

Dr. Novak has mistaken my views when he attributes to me the idea that change is "the Halakhic value," and then attempts to demolish this straw man by indicating that there were scholars who objected to change. Change is not a halakhic value; it is a halakhic fact. It may be regarded as good or as evil by different observers and in different instances. But even if it were true that, in the case of *prosbul*, Hillel "was forced to choose between two evils," the choice of the lesser evil is already a relative good. Actually, my paper clearly notes the fact that the Halakhah responded to life even when the Halakhists were unhappy about conditions that they could not overcome. A case in point is the willingness of some leading authorities in Spanish Jewry to reintroduce the Biblical category of *pilegesh* "concubine," in order to reckon with non-marital sexual liaisons among some members of the Spanish-Jewish aristocracy.

It is significant that those who wish to make out a case for the immobility of the Halakhah do not hesitate to argue that a religious law may be immoral. They then fall back upon the one instance of the *mamzer*, "the illegitimate child," who is excluded permanently from marrying into the Jewish community. As the passage in *Midrash Koheleth Rabba* 4:1 clearly demonstrates, the Rabbis lamented what they felt was their inability to deal with this problem. But this is the exception that proves the rule. The anguish that the Rabbis experienced in this area is a measure of the high level of their ethical sensitivity.

Today, the greater permissiveness in sexual relations in Western society has removed much of the stigma of illegitimacy among our contemporaries. Whether it is a plus or a minus may be left undecided here. What is clear is that the moral problem of the illegitimate child who, on all accounts, is innocent of wrong-doing, must be confronted, so that the heavy disabilities which the Halakhah visits upon him may be ameliorated. In my book, *Love and Sex: A Modern Jewish Perspective*, I suggest an approach to the problem in halakhic terms. Better procedures may be found by others -- the problem cries out for solution. In any event, one instance against scores of examples on the other side can hardly be expected to demonstrate either the unchangeability of the Halakhah or its independence from ethical norms.

Those who insist upon these principles and then protest their sympathy for those who are their victims, like the *'agunah*, "the chained wife," are in the position of the father who, after spanking his son, assures him, "It hurts me more than it hurts you." To which the youngster replies, "But not in the same place."

•

Rabbi Ben Zion Bokser, in his brief comment, has made a significant contribution to the discussion on the development of Halakhah. He has

pointed out that the process was not a peaceful progression from one step to the next, but that frequently it was a struggle between contending parties until victory was won by one side or the other. Nor was the controversy purely intellectual. It involved human emotions of hostility, bitterness and recrimination, and was not free even from physical violence. Unbelievable as it sounds, the Talmud declares that the two schools, of Bet Hillel and Bet Shammai, fought physically with one another and that there were casualties in the battle. (J. *Shabbat* 3c). Generally, however, issues were determined by the vote of the members of the academy.

The implication is clear for our day. In the future, as in the past, there will be strict constructionists and liberal constructionists of the Halakhah. The conflict between them may be sharp, but it is to be hoped that they will remember the conclusion to which the Talmud comes with regard to the controversies of Bet Hillel and Bet Shammai, "both these and the others are the words of the living God" (B. *Erubin* 18b).

Rabbi Bokser correctly points out that "not every conflict between morality and the law was resolved by the Rabbis." He also calls attention to the tragic instance already discussed of the *mamzer*, "the bastard," for whom all the Rabbis, with all their exegetical ingenuity, could not find a remedy. That law has its limitations is a sobering fact. It does not free us from the obligation to use its resources to the fullest degree possible to advance justice and mercy.

•

Dr. Bokser calls attention to the role of conflict in the dynamic halakhic process in the past. Dr. Louis Jacobs stresses the difficulties in the present that confront the Halakhists who seek to make Jewish Law responsive to contemporary life. He finds a major obstacle in the Talmud itself. The Babylonian Talmud shows little or no interest in establishing accurate information with regard to the past, whether it be the authorities quoted or the traditions presupposed in the legislation. Instead, the Talmud is more concered with creating monolithic constructs in which the varied materials of earlier ages are incorporated, while their differences are disregarded by a harmonistic exegesis which often falls back upon sylistic devices, like the use of "sacred numbers." Nevertheless, it should be pointed out that recognizing the existence of such stylistic devices may help to disentagle the elements which have been combined, often for mnemonic purposes, at a time when written texts were rare or nonexistent.

Rabbi Jacobs points to another difficulty, "the acceptance by all the post-Talmudic Halakhists of the Talmud as the final court of appeal." Undoubtedly, the existence of this attitude served as a brake on the dynamism of the Halakhah. Yet, in practice, the dictates of life frequently went beyond the abstract theory. Post-Talmudic Halakhah, as my paper

points out, did move forward beyond the parameters of the Talmud, in medieval and even in modern times.

Dr. Jacobs reminds us of the paradox that "the halakhic system is one in which change takes place in the theoretically unchanging system." Elsewhere, I have called attention to the analogy provided by the United States Constitution which remains the basic document in American law. It has been emended only thirty times in two hundrend years, so that it is virtually sacrosanct. Yet thousands of enactments, local, state and federal, as well as administrative rulings and, above all, untold judicial decisions, have effectively and fundamentally modified the Constitution in practice. To apply Galileo's words, *e pur si muove*, "and yet it moves."

It is true that today a great majority of Halakhists operate in a closed circle — only he is an authority who is wedded to a static and monolithic view. On the one hand, they cannot impose their standpoint upon those committed to a dynamic view of Halakhah. On the other, those who believe in a dynamic Halakhah have neither the power nor the desire to impose their views upon the defenders of the static view. Rabbi Jacobs has proposed a superb formulation of my reinterpretation of Solomon Schechter's concept of Catholic Israel as "the consensus of the concerned," for which I am grateful.

That there is this dichotomy of views is no genuine cause for alarm. In Talmudic times and among the medieval philosophers there was no single view of the meaning of *Torah min hashamayim*, "the Divine origin of the Torah." Admittedly, today, there is a wider spectrum of views on the subject. What is needed is courage as well as knowledge, sensitivity as well as reverence, so that non-fundamentalists, building on the impressive evidence of dynamism in the Halakhah, may go forward.

•

In my original paper, I concentrate almost entirely on traditional Halakhah-Biblical, Mishnaic, Talmudic and medieval. I avoided discussing modern and contemporary Halakhah in the presentation, so that the essential characteristics of the classical Halakhah would not be vitiated or complicated by modern problems and by the rise of religious pluralism in the Jewish community.

While Dr. Novak is fearful that the dynamism of Jewish law may serve as the basis for changes to which he is opposed, Professor Seymour Siegel takes his departure from this principle. He boldly calls attention to the "unfinished business" that confronts the contemporary Halakhist who wishes to make Jewish law relevant to the age. Undoubtedly, many items on his list will elicit differences of opinion. Thus, unlike Rabbi Siegel, I have strongly advocated the retention of the second day of the Festivals in the Diaspora (*Yom tov sheni shel galuyot*) [*Jewish Heritage*, Spring 1966]. My view rests on pragmatic and "sociological" grounds, since the halakhic basis for the practice is extremely slight. Because "the Torah was not given

to angels," but to human beings of flesh and blood, there is the risk of error. That a living Halakhah may make decisions not to my liking is entirely natural. Every Sage in the Talmud underwent this experience. Judaism will survive mistakes; what is fatal is inaction. Basically, I find myself in agreement with Professor Siegel.

•

Professor Jacob Neusner, whose specialties are Talmud and Talmudic history, restates his essential agreement with the basic thesis of my paper several times, for which I am grateful. I should like to comment on a few issues raised by him:

1. It is true that the vast majority of instances that I have cited come from teachers of the Mishnah rather than from the authorities of the Gemara. This is no accident. The creative impulse, as I have pointed out, was strongest in the Mishnah, less vigorous in the Talmud and weaker still in the post-Talmudic medieval period. However, my paper indicates clearly that at no time, not even in the Middle Ages, was this dynamic attribute of the Halakhah totally lost.

2. Professor Neusner presents his paradigm of the relationship of Mishnah to Midrash. I still find the one proposed in my own essay more plausible. He denies that one may speak of the "spirit of the Halakhah." Yet he himself says, "The law inexorably and ahistorically unfolds as an expression and articulation of its own deep structure and logic."

Actually, every legal system operates with the fiction of being a consistent, logical structure above and beyond the specific details of concrete existence. The U.S. Supreme Court only rarely reckons explicitly in its decisions with social, economic and cultural factors. Even when it makes a turn of 180 degrees, as it has done on many basic issues, it attempts to erect an externally coherent logical pattern for its clearly contradictory views. This is true even in our age, when the reality of change is universally recognized. The Rabbis of the Mishnah cannot therefore be faulted for their failure to reckon *consciously* with the historical vicissitudes of Jewish life. That, however, does not exempt the modern historian from applying these canons to the understanding of the inner dynamic of the law.

3. To speak of "the spirit of the Halakhah" and to attempt to set forth its basic characteristics does not negate the necessity to deal with its component elements in their specific time and place. But I do not believe that "history means detail, not generality." Exclusive concern for detail is chronology; history attempts to generalize from specifics, as do all disciplines, natural and humanistic.

To be sure, the difficulties and pitfalls in humanistic studies are far greater than in the natural sciences, but this is inherent in the far more complicated nature of the material being studied. Human nature is intractable in its limitless individuality, unlike the more uniform material

with which the physicist works. Yet even this condition has been radically modified in twentieth-century nuclear science, thus producing a greater degree of uncertainty in theoretical physics and related fields as well! For most purposes, however, every atom of sodium is like any other, but each man is like no other. The historian must always be alert to the individual examples with which he deals. But he has not fulfilled his function unless, after having taken all necessary safeguards, he seeks to discover the general principles that can be derived from the individual elements.

4. Professor Neusner declares that the Mishnah is "anti-historical." The statement is, of course, very striking, but I am unable to agree. Anti-historicism presupposes a conscious rejection of history. This is not the case with the Mishnah, which is non-historical, since the historical sense in general was only slightly developed among the ancients, as has already been noted.

5. Finally, Dr. Neusner persists in describing my paper as a contribution to Conservative Jewish theology. I understand that he has publicly disaffiliated from Conservative Judaism. But if he accepts the basic thesis of my paper and is no longer a Conservative Jew, it is clear that my paper is not merely an exposition of Conservative theology but an effort to understand the dynamics of the Halakhah. That an ex-Conservative Jew like Professor Neusner can agree with the underlying theme of the essay demonstrates that it is not bound up with one specific theological outlook. As this symposium makes clear, the spokesmen for Reform and Reconstructionist Judaism generally agree with this same thesis. They are joined by some distinguished exponents of Orthodox Judaism, who have no difficulty in recognizing the operation of the dynamics of the Halakhah while retaining their own Orthodox theology.

Having known Dr. Neusner for many years, I would never have included him among the garden variety of academics who are terrified at the thought that their scholarship may have some relevance for life. If the thesis is wrong, disprove it. If it is right, is it a fatal flaw if it can help meet the problems of our age?

•

Rabbi Jacob B. Agus has made a signal contribution by reminding us that the approach to Halakhah — and, for that matter, to any basic aspect of human experience — ultimately rests upon a world-view, upon the axioms and postulates not susceptible to proof with which one begins and without which no rational discourse is possible.

His paper presents a valuable *précis in parvo* of the philosophy of religion of one of the most significant Jewish thinkers in American Judaism. Since form and content are always organically related, his formulation is uniquely his own. While I would approach the issues with a different vocabulary, I do not believe that my theistic approach is radically different from his panentheism.

I note with pleasure that he recognizes the significance of Jeremiah 18:18 — to which Ezekiel 7:26 may be added — as indicating the three principal strands of religious and cultural leadership in ancient Israel, the priests, the prophets and the sages. Throughout my Biblical research, these verses have pointed the way to an understanding of (a) the independent role of each strand in Biblical Judaism, (b) their mutual impact upon one another and (c) their ultimate synthesis in the Jewish tradition.

Equally valuable is his emphasizing the place of Maimonides, not as a foreign intrusion, but as an authentic and indigenous component in the mainstream of Judaism. This applies to his philosophical as well as his rabbinic works.

Finally, more than any other contemporary thinker, Dr. Agus has stressed the role of *takkanot*, "new ordinances," *minhagim*, "popular custom," and the *Aggadah*, the non-legal elements in the Talmud and Midrash, as the cutting edge for the introduction of new insights and approaches in Jewish life and law.

•

Dr. Ira Eisenstein is concerned to emphasize the far greater extent of the problem confronting Halakhah in the modern age as against earlier periods. He points out correctly that before the Emancipation and the Enlightenment, the "common people still reflected the consensus to which the authorities were prepared to bow . . . a common acceptance of traditional postulates." Since the majority of modern Jews no longer observe the detailed prescriptions of Halakhah and vast numbers deny its theoretical base as "the word of God," he insists that the traditional Halakhah is dead beyond recall. He calls for a new Halakhah based upon a "democratic expression of view" by "the people's representatives, selected by the people and responsible to the people."

There is a story attributed to Rabbi Samson Raphael Hirsch, who was approached by a group of radically-minded Jews from the Frankfurt community, asking that the traditional prayer service be reduced in size. Hirsch answered and said, "You remind me, gentlemen, of a man who owed his neighbor a thousand marks. When the time for payment came near the borrower said to the lender, 'A thousand marks is a lot of money. Would you cut the debt in half?' 'Fine,' said the lender, 'let me have 500 marks.' 'No, I don't have the 500 marks either,' was the reply. 'In that case,' said the creditor, 'you may as well owe me the 1,000 marks.'" To ask "all the people," including those who have no interest in the Halakhah, to pass judgment on its contents is like calling upon anarchists to decide policy for the government. Such an approach means opening the door to nihilism.

Instead, several years ago, I proposed the concept of Catholic Israel as representing "the consensus of the concerned," to use Dr. Louis Jacobs' fine formulation. The concept of Catholic Israel is basically democratic,

because every Jew is eligible for membership in its ranks. In practice, however, no democratic government expresses the will of the entire people, but only of those persons who are sufficiently interested in it to exercise the franchise and to obey the laws. There are times when nearly all eligible voters exercise their rights of franchise. Generally, the percentage going to the ballot-box is only a fraction, sometimes less than 50 per cent, of the whole electorate. Our government, however, remains a democracy because potentially every American has a voice in the conduct of its affairs.

Indifferent citizens who do not exercise the franchise, and criminals convicted of an offense who forfeit their citizenship, constitute two classes that have no voice in the conduct of the government. At the opposite pole from the criminals are certain extreme idealistic groups who voluntarily relinquish their rights in the state. Henry D. Thoreau, the great New England naturalist, was a philosophical anarchist who wrote on "The Duty of Civil Disobedience." He remains a great American, but he was not consulted in the town meetings at Concord. Similarly, pacifists in times of national crises are honored for their devotion to principle and they are not read out of the American people, but they are not asked to decide the military and diplomatic policies of the government.

In theory, democracy is the government of all the people; in practice it is government by all elements of the people who recognize the authority of the law and actively express their interest, at least by going to the ballot-box. If we apply this analogy to our problem, it is clear that Catholic Israel is not co-extensive with the Jewish people; nor, on the other hand, is it restricted to those who observe the Law unchanged.

Catholic Israel is the body of all men and women within the Jewish people who accept the authority of Jewish law and are concerned with Jewish observance as a genuine issue. It therefore includes all who observe the Law, whatever their formal affiliation, even if it be none. The character of their observance may be rigorous and may extend to minutiae, or it may include modifications in detail. Catholic Israel embraces also all those who observe Jewish law in general, although they may violate one or another segment of it, and who are sensitive to the problem of their non-observance because they wish to respect the authority of Jewish law.

Moreover, Catholic Israel is vertical as well as horizontal, that is to say, it includes the generations gone before, whose lives and activities have determined the character of the tradition transmitted to us. Their practice cannot permanently bar the way to growth, but it must necessarily exert some influence upon our decisions regarding changes from accepted tradition. The past should have a vote, but not a veto on the present and the future. The future of Halakhah must and should be determined only by those who manifest a concern for it and a recognition of its authority, at least in theory.

This concept of Catholic Israel meets the problem theoretically.

Pragmatically, it means that each religious group will establish its own authoritative body, be it Orthodoxy (which will probably have more than one), Conservatism, Reform or Reconstructionism. Each Commission on Jewish law would have authority for those who recognize its authority.

•

In his brief comment, Dr. Solomon B. Freehof, unquestionably the outstanding authority on Rabbinic law in Reform Judaism, raises a fundamental question. Granted that the Halakhah has been dynamic during its past, does it possess sufficient flexibility to meet the needs of an age characterized by future shock? He suggests that on some subjects, like that of the *ʿagunah*, the wife who is unable to secure a *get* from her civilly divorced husband, the only recourse may be to have the old law "simply fade away and cease to exist as law," as was the case with the *ʿeglah ʿarufah*, the rebellious son, and the *sotah*.

He is , of course, speaking from a perspective that respects the Halakhah but does not accept its authority, for whom the Halakhah, as he has said, is guidance but not governance. Conceivably, Dr. Freehof may be right and the dynamism of the Halakhah is spent. However, those of us who are dedicated to maintaining the authority of the Halakhah and believe that a meaningful Judaism without it is impossible, are unwilling to accept its nullification or its atrophy until all of the resources inherent in the Halakhah have been exhausted. We believe that it is not the Halakhah but the Halakhists who have been found wanting.

One or two specific observations with regard to marriage. As the essay indicates, the Talmud gives the rabbinate the power to annul a marriage. Rabbi Freehof recognizes that the legitimacy of the children is not in question. But, he asks, would they be deemed legitimate by their friends and by themselves? The answer is unquestionably "Yes," since, in secular terms, they would be the children of a marraige terminated by a secular divorce.

As for Rabbi Moshe Feinstein's device of offering "relief" to an *ʿagunah* by declaring a marriage under non-Orthodox auspices non-existent, the answer, in all due respect, would be *lo midubhshakh velo me ʿukẓakh*, "Spare us both your honey and your sting" (Midrash, *Bamidbar Rabba* 20). Conservative Judaism insists on the legitimacy of the marriages performed under its auspices which are in conformity with the Halakhah. Authentic religion must not be confused with politics masquerading as religion.

•

The truth of the apothegm, "*les extrêmes se touchent*," is vividly demonstrated when we juxtapose the papers of Dr. Bleich and Dr. Eugene Mihaly. Speaking from the opposite ends of the religious spectrum, both scholars reveal a striking identity of views, in form as well as in substance.

They both write with great passion and are not deterred from strong language in attacking those who differ from them. The similarity goes further. Fundamentally, they both conceive of the Halakhah as absolute, rigid, unchanging, uninfluenced either by social, economic or political conditions from without or by new religious ideas and ethical ideals from within.

They differ in only one respect — a major one to be sure — in the conclusions that they derive from their identical view of the Halakhah. Dr. Bleich demands the total acceptance of his Halakhah, with no change or modification. With equal vigor, Dr. Mihaly calls for the total rejection of the Halakhah as largely worthless in substance and irrelevant to life. I reject both positions — or, more accurately, the one position shared by both of these scholars. The grounds for opposing an absolutist conception of the Halakhah are to be found in the paper which initiated the discussion and need not be repeated here.

To speak directly to Professor Mihaly's paper, it seems to me that most of his strictures should be directed, not against the Halakhah, the innate, creative capacities of which he has not been able to disprove, but against the Halakhists, especially in our own day. To these "guardians of the gates" the words addressed by God to Eliphaz, His "defender," may well be applied, "For you have not spoken the truth about Me as has my servant Job" (Job 42:7, 8).

There is considerable value, nevertheless, in Professor Mihaly's attack upon the Halakhah. He has demonstrated that all is not "sweetness and light" in the rarefied atmosphere of halakhic discussion and that there are, as I have indicated both in the paper and in this response, major areas crying out for redress. Since I believe that there are inherent resources for growth and development in the Halakhah, I see no need to adopt a position of total rejection, as he advocates.

Professor Mihaly takes for granted that in my setting forth the various instances of the dynamism of the Halakhah I necessarily endorse all the changes which this characteristic made possible, such as the ruling with regard to the *pilegesh* or the *shtar ʿiska*. This is not at all the case. The instances quoted are designed to indicate the responsiveness of the Halakhah to felt conditions. Whether the response or the method was justified or not in every instance is a subject for separation discussion.

That the Gemara has an ahistorical explanation of the *prosbul*, as has already been indicated in this response, is not at all astonishing in view of the ahistorical conceptions prevailing in Talmudic times. I believe, however, that Professor Mihaly goes too far in suggesting that the *prosbul* was intended for the benefit of the rich alone. I am reminded of a paper published years ago under Communist auspices in White Russia. It argued that the provision in Deuteronomy 24:11 that the rich creditor must return the garment to the borrower at nightfall and in the morning must wait outside the poor man's home for him to return the pledge was

due to a desire to prevent the poor man from attacking the rich man in his home!

Professor Mihaly takes strong exception to my use of the terms "deductive" and "inductive" to describe the techniques of the Midrash and the Mishnah respectively. Since I clearly indicate the specific meaning I attach to these terms, his ire is difficult to understand, unless it be because he objects to my describing the method of the Mishnah as "deriving from life situations."

With regard to his contention that the Mishnah is based directly on the Rabbis' exegesis of the Biblical text, the examination of any page of the Mishnah will indicate how few and far between are such citations as the source and basis of Mishnaic enactments.

Professor Mihaly pours his scorn on legal fictions in Jewish law, which he describes as acceptable only "in a medieval context which operated with the myth of a literal, Divinely-revealed law . . . with negative and even debilitating effects." He is much too cavalier in dismissing the entire practice. Its importance was stressed in Henry Maine's classic work, *Ancient Law*, and it is by no means a dead letter today. Witness the Fourteenth Amendment to the U.S. Constitution, which was adopted in 1868, after the Civil War, in order to protect the rights to citizenship of black Americans. It declares that, "No state shall deprive any person of life, liberty or property without due process of law." By a process of "interpretation" or "legal fiction," the concept of a business corporation as a "legal person" was accepted and the Amendment has become the basis for the powers and privileges of corporations in twentieth century America.

Undoubtedly, there are problems connected with the use of legal fictions. Yet, since no legal system exists without them,what is required is not denunciation but analysis of the various categories and functions of the practice, some of which may prove to be legitimate and even necessary.

Because of my statement that "Orthodoxy in America has also yielded" on the practice of mixed pews, Professor Mihaly charges me with disregarding the responsa of his "revered teacher, Dr. J.B. Soloveitchik, and of Rabbi Moshe Feinstein on the subject." Professor Mihaly has evidently overlooked the important differences between these great luminaries on the subject of separate seating as treated recently in the columns of this journal ("Midrash, Mehitza and Modernity," by Alan J. Yuter, JUDAISM, Summer 1979). I must insist that my characterization is correct — the majority of Orthodox synagogues in America do not fulfill the requirements on the subject as set down by Rabbi Moshe Feinstein, and many of them do not meet even the specifications of Rabbi Soloveitchik.

With regard to his onslaught on Conservative Judaism, I am not an apologist for the movement. Undoubtedly, the movement has been guilty more than once of "too little and too late" — an occupational hazard of all

established institutions. Perhpas I am more sympathetic than Professor Mihaly to the psychological factors that have operated in this area. But I share his conviction that the movement has committed its share of sins of omission, not to speak of other categories of transgression. What the hour requires, however, is not recrimination but determination to go forward.

In conclusion, Professor Mihaly paints a dark portrait indeed of the Halakhah and its exemplars throughout its history. Yet he cannot deny that the Halakhah contributed mightily to the great miracle of Jewish survival during twenty centuries of dispersion, persecution, spoliation, expulsion and massacre. To reverse a question posed earlier in this paper, if it is so bad, why was it so good?

•

In a wide-ranging discussion on the nature of Halakhah and its history, Dr. Leonard Kravitz calls attention to the fact that in the long history of the Jewish people various socio-economic stages may be distinguished. The primitive, semi-nomadic period was followed by the early agricultural-urban stage of the First Temple period. This, in turn, was succeeded by the more advanced urban economy in which merchants became the dominant factor. This stage prevailed not only during much of the Second Temple period, but also during the Diaspora when Jews were effectively excluded from most other sectors of the economy.

As the socio-economic character of the Jewish community changed, so did the Halakhah, keeping pace with the new problems and needs of the age. That this is an important factor, though not the only one, in the evolution of Jewish law is a valid observation, even if one does not necessarily accept Professor Kravitz's rationale for the *prosbul* and other institutions. Equally valid is his pointing out the radical nature of the Emancipation Era in transforming what I have called "the natural community" of ancient Palestinian Jewry and "the compulsory community" of the medieval Diaspora into "the voluntary community" of the Emancipation period.

My one important demurer to Professor Kravitz, as well as to several other of the symposiasts, is the misapprehension of my basic thesis. When I stressed "a dynamic Halakhah," I was not suggesting that *all* the Halakhah and *all* the Halakhists represented the dynamic principle. That Rabbi Simon ben Gamaliel favored the imposition of capital punishment is true, but what matters is the *dominant thrust* of the Halakhah which tended to make the practice increasingly difficult, to the point of its total elimination. That Adolph Eichmann was executed in Israel is the striking exception to the rule, highlighting the remarkable ethical stance of the State of Israel in not invoking the death penalty upon hundreds of terrorists apprehended and convicted for their crimes.

The ethics of capital punishment is not a sociological question dependent upon which classes of society favor, or are opposed to, the

practice, but an ethical issue. The ethical judgment on the question, be it what it may, is independent of the results of a public opinion poll.

So, too, it is essentially irrelevant as to how many Conservative women would remarry without a Jewish divorce, or how many Orthodox women would recognize a Conservative enactment freeing them from the status of an *ʿagunah*. Our goal must be a law of justice and mercy. When one arrives at a basically satisfactory concept of the nature and authority of Jewish law, there is a moral imperative to make that view prevalent among ever larger segments of the Jewish people.

Dr. Kravitz declares, "The question is not how do we modify the Halakhah as much as it is how do we maintain the Jewish group." These are not contradictory alternatives. Maintaining the Jewish group requires a broad strategy, but one indispensable element is the cultivation of a dynamic Halakhah. Modern Jews need the conviction that they are within the mainstream of a Jewish tradition which, today, as in the past, is relevant to life's concerns and is responsive to humankind's needs, aspirations and highest ideals.

•

Professor Reines presents his analysis of our paper by subsuming his presentation under four headings. We may be grateful to him for thus sharpening the focus and helping advance the discussion. I shall respond to his comments in similar form:

1. Dr. Reines recognizes, quite correctly, the theological substratum beneath the discussion of the content, nature and direction of the Halakhah. However, he suggests that there are only two general positions regarding "the authorship of the Halakhah (to use his rather anthropomorphic phrase): one, that God is the author and two, that humans are the authors. If we accept the first view, there can be no change in the Halakhah. If we accept the second, we have the right to change any of its provisions." This approach I find not merely simplistic but misleading, because it omits a third option: that the origin of the Halakhah, being part of Torah, is Divine, but that its custodians, transmitters and interpreters are humans, as are the men and women who are to be governed by its provisions.

This position is clearly adumbrated in two Talmudic passages that I have cited above. The first describes the controversy between Rabbi Eliezer ben Hyrcanus and his colleagues. The second is the Aggadah of Moses' inability to understand the lecture by Rabbi Akiba which the Sage, nevertheless, concluded by the formula, "It is the law from Moses on Sinai."

In sum, we are not compelled to choose between Rabbi Reines' alternatives. A faith in the Divine origin of Torah is entirely compatible with a recognition of the dynamic character of the Halakhah.

With regard to the question that he raises regarding the elements in

Jewry over whom the Halakhah has authority, the answer is precisely as he has stated, "All Jews have an obligation to obey Jewish law." Because of the religious pluralism now existing in the Jewish community — compounded, in part, by informed freedom of choice and, in part, by confusion and ignorance — the process of winning Jews toward a recognition of the authority of the Halakhah is one of education and persuasion. This, in essence, is what every religious leader is engaged in doing — winning his readers listeners to a voluntary acceptance of the authority of the imperatives of Judaism as he understands them.

Dr. Reines then proceeds to repeat the various canons of change in the Halakhah enumerated in my paper, applying them to the majority of contemporary Jews who are non-observant. He then argues that the logical conclusion from my presentation is that the laws against adultery and for the observance of the Sabbath and the dietary laws are thereby nullified. Of course, I never proposed that contemporary Halakhists act as a rubber stamp for the popular will — or will not. Dr. Reines has overlooked the important caveat in my paper, "This is not to suggest even remotely that tradition is bound to surrender to 'the spirit of the age.' It is always free, indeed commanded, to examine the demands and insights of each generation and to accept, modify or reject them as it sees fit."

In setting forth my concept of Catholic Israel, I already pointed out that the popular will with which we must legitimately reckon is the attitude of those Jews who basically accept the authority of Jewish law, without necessarily observing it in its totality. It will, therefore, include Jews officially affiliated with every wing in Judaism or with none.

I heartily endorse Professor Reines' conclusion, "It is also clear that without a relevant and significant Jewishness, the Jewish community has little chance to endure. . . . [I]f the Jewish community wishes it, there is room for halakhic and non-halakhic Judaism to exist side by side, not only in friendship but in mutually enriching dialogue."

•

A Post-script to a Long Afterword

The tragedy of our age is polarization, the escalating violence and the hostility — verbal, intellectual and physical — with which men assault each other, even when the differences among them are slight or unimportant. Unfortunately, the hostility, all too virulent in the Jewish community, has penetrated the area of religion as well.

William Butler Yeats described our age prophetically in "The Second Coming":

> Things fall apart; the center cannot hold
> Mere anarchy is loosed upon the world . . .
> The best lack all conviction, while the worst
> are full of passionate intensity.

Since Jews are like other people only more so, it is perhaps to be expected that the divisiveness of modern society should have infected the Jewish community to an unconscionable extent. Unfortunately, we are in no position to afford this luxury.

Efforts have been made to heal the breach or, better still, to bridge the gap. Years ago, as I know out of my own personal experience, the late Rabbi Meir Berlin strove for this goal. It undoubtedly served as a motive for Rabbi Judah Maimon's call for "a renewal of the Sanhedrin."

In the recent past, there were those who hoped to be able to build bridges of understanding and cooperative effort uniting those who might differ and agree. Not long ago, Professor Ephraim Urbach, professor of Talmud at The Hebrew University, launched a *Tenuᶜah Lemaᶜan Hayahadut*, a "Movement For Judaism," to unite all Jews committed to a spiritual interpretation of their Jewish heritage. Its goal was to strengthen Jewish religious and ethical ideals and to act as a countervailing force to the politicizing of religion that has been rampant in the State of Israel. On a far more modest level, Rabbi Rackman and I, some time ago, discussed the possibility of organizing a discussion group, in the United States, of Jewish scholars and thinkers who shared an acceptance of the authority of the Jewish tradition, a concern for its vitality, and a recognition that variety in detail need not prevent common thought and cooperative activity in many areas. Increasing polarization has made it clear that, for the present at least, many who are in sympathy with these aims would find it difficult, if not impossible, to participate, because of the dangers of vilification and attack to which they would be subject.

For the present, such unitary efforts seem clearly impractical. Yet the task must be undertaken if we are to avoid the danger to which the Rabbis refer when they commented on the Biblical commandment *lo titgodedu* (Deut. 14:1), "Do not make yourself into *ʾagudot ʾagudot*, into hostile factions" (*B. Yeb.* 14a). The only practical course for the present is for each group to work at the problem of a relevant Halakhah from its own perspective and for its own constituency. If we believe in the enduring viability of Torah, we will not falter in the faith that, out of the interplay of varying views and their interaction with the world about us, the dynamism of Halakhah will untimately prevail. If the task cannot be done by all groups working together, let it be done by each working separately — but let it be done.

"To Do Justly": The Resolution of Jewish Problems in American Courts

MARK F. LEWIS

A NUMBER OF YEARS AGO, A RECORD ALBUM was produced with the title "You Don't Have To Be Jewish." This compendium of basically Jewish jokes included one skit in which Frank Gallop, the very proper announcer of the old Perry Como Show, played the part of the Judge, while Lou Jacobi, a master of Yiddish dialect, took the role of the jury foreman. In his most deep, serious tone, the Judge asked: "Mr. Foreman, has the jury reached a verdict?" To which Jacobi replied, after a long commentary on the panel's arduous deliberations, that the jury decided that it "shouldn't mix in."

That may be a somewhat stereotyped rendition of how an all-Jewish jury might view the many problems that find their way into American courts. But what of the reverse: how do American courts view particularly Jewish problems, those whose import may be really appreciated only by people who have grown up in a Jewish milieu? The cases studied below reveal that American courts, when faced with questions that contain both religious and secular characteristics, show a high degree of sensitivity and a willingness to resolve the problems by resorting to established principles of secular law.

This article is not concerned with the "big cases" — those that deal with such fundamental questions as, for example, the legality of Bible reading in schools, or the rights of Sabbath-worshipping federal employees to change their working hours, but with "smaller" issues that affect particular individuals.

Recognition of Jewish Problems

One of the most eloquent decisions showing a sensitivity to Jewish problems was rendered in the case of *Bachrach v. 1001 Tenants Corporation*.[1] Alfred Bachrach, a senior partner in a firm of certified public accountants and President of New York's Congregation Emanu-El, had bought stock in, and signed a lease with, a cooperative housing development operated by the defendants. A provision in the lease mandated that the sale could be completed only if it was approved by the Board of Directors. When the Board refused to ratify his purchase, Bachrach

1. 41 Misc. 2d 512, 245 N.Y.S. 2d 912 (Sup. Ct. 1963).

MARK F. LEWIS *is in the private practice of law in Tampa, Florida.*

charged that his religion was the only reason for the denial. In its decision, the trial court held that although the corporation could refuse to consent to the purchase for no reason whatsoever, the Board could not act on such illegal or ulterior motives.

Not content merely to render this opinion, however, the trial judge went on to castigate those who engage in anti-Semitism, a practice which he labelled a "foreign import":

> It was inevitable, perhaps, that the body politic of our pluralistic society might on occasion tend to contamination by alien infection. But Americans of all faiths have ever been alert to recognize the disease for what it was — the most potent anti-democratic weapon in the arsenal of radical reaction.[2]

Anti-Semitism on the job came under attack in a Florida case that arose in Miami,[3] where a Jewish employee of a county hospital had been the target of a barrage of derogatory remarks from her supervisor. The supervisor was demoted, eventually being reinstated after she tendered a written apology and forfeited the salary she had lost while she was at the lower pay grade. In fighting to recover the lost wages, the supervisor argued that her employer had infringed on her free speech rights.

Not so, replied the court. The remarks had not contributed to the growth of public knowledge about important issues. As a result, they were not afforded constitutional protection, and the value of free speech in this instance was far outweighed by the hospital's need to maintain harmonious relationships between its employees.

The observance of religious holidays was appreciated by one New York court that was asked to deal with a landlord-tenant problem.[4] Ungar, the landlord, gave Schwartz, the tenant, eleven days in which either to vacate his apratment or agree to a one-year lease that would raise the rent by 23%. When Schwartz did not leave, Ungar filed suit.

Was the notice here reasonable? Under ordinary circumstances, it might have been, but here the facts were different as

> the eleven day period included the Thursday and Friday of the Jewish New Year, a fact referred to in the notice itself. Judged by any standard, the notice was not "reasonable."[5]

Apparently the court was impressed by two facts — the religious beliefs of the tenant and, perhaps more compelling, the fact that the landlord indicated in his notice that, because of the holidays, his own

---

2. 245 N.Y.S. 2d 912, 916. Unfortunately, two higher New York courts reversed this decision on technical grounds, holding that the law under which Bachrach brought suit did not provide for private lawsuits. 21 App. Div. 2d 662, 249 N.Y.S. 2d 855 (1st Dept. 1964); 15 N.Y. 2d 718, 256 N.Y.S. 2d 929 (1965).
3. *Cowell v. Fuller*, 362 So. 2d 124 (3rd D.C.A. Fla. 1978).
4. *Ungar v. Schwartz*, 30 Misc. 2d 152, 213 N.Y.S. 2d 993 (Dist. Ct. 1966).
5. 213 N.Y.S. 2d 993, 998.

office would be closed on two of the eleven days between the mailing of the notice and the date on which the tenant had to make his decision.

Sensitivity to the religious beliefs of an Orthodox couple was demonstrated by another New York court in the case of *Wilensky v. Greco*,[6] where the parents of a boy who had been killed in a serious automobile accident sought to bar the coroner from performing an autopsy on the body. Apparently the only purpose for this procedure was to determine which of the multiple injuries caused the death. There was nothing in the accident reports to indicate that there was a suspicion of criminal activity or other foul play.

Balancing the state's wishes against those of the parents, the court concluded that "it does not appear, in the face of the pain to be inflicted on the boy's parents, that this autopsy was sufficiently necessary."[7] One wonders how far the judge would have gone to accommodate these religious beliefs had there been a more compelling state interest.

Jewish Law, Secular Courts

It is one thing to recognize that Jews may have special problems that need to be dealt with by American courts; it is quite another circumstance when these same courts are called upon to take Jewish laws and practices into consideration when ruling on suits that have been brought before them. While American judges cannot allow themselves to become entangled in ecclesiastical arguments,[8] these often spill over into secular issues that are properly within the domain of the courts. One example is a case involving Richard Tucker, the late renowned Metropolitan Opera star, whose case stemmed from the contract he had signed obligating him to perform at Miami Beach's Eden Roc Hotel during Passover, 1964.[9] Inserted among the printed provisions was a typewritten sentence that read "if second service to be held, same price as first night." After he had finished officiating on the first night, Tucker learned, from a waiter, that there would be no Seder on the second night of Passover.

Somewhat incensed, Tucker brought suit against the hotel, charging that his contract had been breached and his professional reputation damaged. The trial court, which apparently looked only at the wording of the contract, held that Tucker had no legally binding agreement to perform, nor to be paid for, a second Seder. The appellate court took the case one step further, and asked whether the result would be different if the contract were examined in the light of prevailing religious custom.

6. 74 Misc. 2d 512, 344 N.Y.S. 2d 77 (Sup. Ct. 1973).
7. 344 N.Y.S. 2d 77, 78.
8. One of the best discussions of the tests used by courts in deciding cases with religious overtones is found in *Abington School District v. Schempp*, 374 U.S. 203, 10 L.Ed. 2d 844, 83 S. Ct. 1560 (1963).
9. *Tucker v. Forty-Five Twenty-Five, Inc.*, 199 So. 2d 522 (3d D.C.A. Fla. 1967).

But this summary is rather bland — listen to how the court viewed its job in its own words:[10]

> This case, which stems from the observance of the Jewish Passover festival, can perhaps best be summarized in terms of the famous question found in the Passover Haggadah itself — wherein is this night different from all other nights? For purposes of our legal analysis, this may be paraphrased to be: wherein is a contract for the performance of a Seder different from all other contracts?

If the court could have determined that both parties here understood that a contract to perform a Seder meant two nights' work, then it could have favorably ruled for Tucker despite the fairly clear wording of the contract itself.[11]

Unfortunately for Tucker, such an interpretation could not be used in his case. The court observed that, even though Tucker was Orthodox, the Eden Roc was Reform and, in fact, had presented only one Seder in all prior years. Since there were divergent religious views, the court could not say that Tucker and the Eden Roc had similar understandings regarding Passover observance. Thus, back the court went to basic contract principles, and upheld the trial court in denying Tucker the relief he had sought.

Determining the true religious beliefs of living persons may be difficult enough — but imagine what happens when an American court is asked to discern the religious feelings of persons who are deceased. One such problem presented itself before an Ohio court when the next of kin of two persons buried in an Orthodox cemetery asked permission to disinter the bodies and to place them in a Reform cemetery.[12]

In its very thorough opinion, the Ohio Court of Appeals dwelled on the conflicting claims of the "expert" witnesses. An Orthodox rabbi testified that disinterment was allowed only if there was a stipulation in a will, or if it was necessary to unite husband and wife, or if the body was to be reburied in Israel.[13]

Not to be outdone, the relatives seeking the disinterment offered testimony from their Reform rabbi. He not only gave the Reform view that disinterment was sanctioned if the end result would be to bury families together, but also noted how Orthodox Jewish law was far from settled on this point. He quoted Rabbi Moses Sofer's opinion that disin-

---

10. *Id.* at 523.
11. Courts are allowed to go beyond the apparent meaning of contracts by examining whether certain well-established customs and usages in particular situations, which were known or presumed to be known by other parties, cause "certain words (to) acquire a different meaning than their dictionary definition or the meaning as used generally." L. Simpson, *Contracts* §201 (1965).
12. *Tamarkin v. Children of Israel*, 2 Ohio App. 2d 60, 206 N.E. 2d 412 (1965); *app. dismissed*, 384 U.S. 157, 16 L. Ed. 2d 433, 86 S. Ct. 1380 (1966).
13. 206 N.E. 2d 412, 414.

terment was a meritorious act, "particularly when the removal is of benefit to the dead and would be presumably desired by a deceased."[14]

Faced with this conflicting testimony, the court refused to side with one particular viewpoint. The religious objections to disinterment could be considered only if they could be identified as the views held by the deceased. In this case, the court could come to no such conclusion. Since the Orthodox rabbis and scholars had their differences of opinion, and because the court could not really determine what the true wishes of the deceased would have been, it put religious considerations aside and ruled that the relatives' petition for disinterment should be granted.

Marriage and Divorce

Not surprisingly, questions involving Jewish customs and beliefs often arise in domestic relations suits. Couples contemplating marriage frequently make many promises to each other, promises that are often broken when the marriage knot is ultimately tied, or eventually untied. The importance of one such promise, at least to an Orthodox woman, was demonstrated in the case of *Bilowit v. Dolitsky*.[15] Induced by assurances from her future husband that he was, indeed, a practicing Orthodox Jew, Miss Bilowit married Mr. Dolitsky, and consummated the marriage, presumably according to religious law. A short time later, she discovered that he was engaging in many "non-Orthodox" practices, and sought to have the marriage annulled.

Because of the consummation, an annullment could be granted only if the husband's fraud was extreme. Being very sympathetic to what they perceived as the wife's strongly-held beliefs, the judges held that since in her own mind she could not act as a proper wife and mother without her husband's support of her religious beliefs, his fraud was, indeed, gross and far-reaching, and sufficiently serious to warrant the granting of an annullment.

Another case concerned with promises made before a marriage called into question the legal significance of the *ketubah*, the marriage contract. Does it stand on equal footing with other contracts? The Surrogate's Court in Queens County, New York chose to relegate the *ketubah* to ceremonial significance alone.[16] The case had really begun earlier when husband and wife, in contemplation of their marriage, entered into a pre-nuptial agreement. The wife agreed that if her husband-to-be predeceased her, she would not contest being cut out of his will. In exchange for this promise, he gave her some of his significant holdings of blue chip stocks.

When the husband died, the widow tried to get out of the agreement

14. *Id.* at 415.
15. 124 N.J. Super. 101, 304 A.2d 774 (1973).
16. In re *Estate of White*, 78 Misc. 2d 157, 356 N.Y.S. 2d 208 (Sur. Ct. 1974).

by claiming that another contract, the *ketubah*, superseded the first arrangement. In particular, she pointed to a provision in the *ketubah* providing for 100 *zuzim* to go to the wife "in view of thy widowhood."

But what are 100 *zuzim* worth? Can two of them still buy a goat, as they could when the familiar Passover song was written? As it turned out, the wife was not after 100 *zuzim* at all; her reasoning was a little more sophisticated. Since, she argued, 100 *zuzim* have no real monetary value in today's society, what this *ketubah* provision really means is that she should receive the share allowed to widows under New York law. Why? Since the Talmud teaches that the law of the land is the law that the Jews are to follow, and, since she is living in New York, she should be entitled to what all other women in a similar situation are entitled to receive.

While this logic may be intriguing, it was not persuasive. After a brief examination of Jewish customs, the court ultimately held that the *ketubah* was only a matter of form, and that it had no legally binding effect on the property rights of the individual signers.

The advent of "no-fault" divorce in a number of states has eliminated the need for mutual consent in order to avoid unpleasant court appearances. However, consent is still necessary where one party desires to obtain a Jewish divorce as well. Whether one party can compel assistance from the other through use of the judicial system raises interesting questions for state courts.

Florida courts have chosen not to mix in. In *Turner v. Turner*,[17] the trial court judge had ordered the husband to cooperate with his wife in obtaining a Jewish divorce. When the man questioned this ruling, the appellate court agreed that this provision was unenforceable. Cleverly, the appeals court did not reach the crucial church/state question. Rather, it let its analysis end with the observation that Florida law provided for only one type of divorce, and the courts of the state are barred from forcing a person to submit to a ceremony that is not found among the Florida Statutes.

But, in New York, two courts that addressed similar questions in 1973 ruled differently, using other than religious considerations in reaching their decision. In *Rubin v. Rubin*,[18] the parties to the unsuccessful marriage agreed, as part of their settlement, that each would cooperate in securing a religious divorce. When, however, the wife refused to cooperate, the righteously indignant husband stopped his support payments, and the wife hauled him into court on a contempt charge.

Wisely observing that, according to Jewish law, the wife's cooperation was necessary in order for the husband to secure his Jewish divorce, the Judge saw that the husband had considered this cooperation to be an

17. 192 So. 2d 787 (3rd D.C.A. Fla. 1966).
18. 75 Misc. 2d 776, 348 N.Y.S. 2d 61 (Fam. Ct. 1973).

integral part of the bargain which he had made with his wife. Perhaps the Judge could not force the wife to cooperate but he could, and did, relieve the husband of his support obligation. He was not going to reward the wife for breaking her part of the bargain.

Similar logic is found in *Margulies v. Margulies*,[19] which addressed the question of whether an ex-husband could be held in contempt of court for failing to appear before a rabbi to obtain a Jewish divorce. Instead of looking at the bargain between the two parties, the court here considered the affront to its own dignity. Here was a man who had promised in open court that he would take the steps necessary to see that his wife could get the religious divorce, knowing full well that his cooperation was vital. Now, the court noted, he had renounced his promise. Religious question aside, the court could not condone such behavior and it affirmed the trial court's imposition of a fine for contempt.[20]

Questions often arise regarding the religious education of the children after divorce, and the law's role in such problems. Take, for example, a 1978 Florida case in which a father was ordered to pay for his children's Sunday and Hebrew School education.[21] Was this constitutional? Yes, answered the appelllate court. While there must be, the court noted, a complete separation of church and state, there is an exception carved out in those cases where public health and morals are involved. Since the payments ordered here would be aiding to advance such a noble secular purpose, the court agreed that the state had an interest in insuring that they were made.

What made this case fairly easy for the court was the fact that both parents were Jewish, and that there was apparently no objection by either party to the children being so educated. Mixed marriages, however, present more acute problems. If they seem to generate a great many problems while they are viable, these difficulties pale in comparison with those that arise when the marriage dissolves.

One such situation was dealt with in the 1976 New York case of *Schwarzman v. Schwarzman*.[22] After a nine-year marriage that produced four daughters, Jewish husband and former Catholic wife were divorced. The woman had converted to Judaism prior to their marriage at her ex-husband's insistence, but reverted to her original religion after the divorce, married a Catholic, and apparently was headed on a path of raising the children as Catholic when the ex-husband instituted his suit.

Resorting to some well-founded legal reasoning, the court addressed itself to two basic questions. It asked first if the children were Jewish and, if they were, whether the ex-husband could compel their mother to

19. 42 App. Div. 2d 517, 344 N.Y.S. 2d 482 (1st Dept. 1973).
20. An appeal to New York's highest court was dismissed, 33 N.Y. 2d 894, 352 N.Y.S. 2d 447 (1973).
21. *Schatz v. Schatz*, 356 So. 2d 892 (3rd D.C.A. Fla. 1978).
22. 88 Misc. 2d 866, 388 N.Y.S. 2d 993 (Sup. Ct. 1976).

continue raising them as such. To answer the first question, the court had to rule on the legitimacy of the woman's conversion. It noted that she had not gone through the process of Mikvah immersion, and that by Orthodox law her conversion was not complete. But this was not conclusive, as the court also noted that Reform rabbis do not require such immersion when they perform conversion ceremonies.

At first glance it might appear that this would be a good case for implementing the "don't mix in" theory. But the court jumped right back into the religious fray, by maintaining that authorities from all branches of Judaism were in agreement that

> a convert who denies the intention to have become a true convert and renounces the Jewish faith to which he or she was converted and returns to the practices and beliefs of his or her prior faith, annuls the conversion by that fact alone ab initio (i.e., from the start), as having been made in bad faith.[23]

Since the court concluded that the conversion here was not a true one, the mother was never really Jewish and, therefore, the children likewise were not Jewish.

Failing on this count, the husband then turned to a different strategy. Since the wife had agreed to convert prior to their marriage and had also agreed to raise the children as Jews, he argued that this arrangement should be considered a binding pre-nuptial agreement which the wife must now honor. Not so, the court replied. Since the parties did not contemplate divorce, the court refused to consider the conversion agreement as binding at this time.

While the legal reasoning here is sound, it may have been influenced to some extent by the court's findings regarding the sincerity of the father's religious beliefs. It noted that the parents were not members of a congregation, that their attendance at services was infrequent, and that the children were not enrolled in any religious school.[24]

Wills

A properly drawn will allows a person the chance to dictate for one final time how the money that he has accumulated should be distributed. Courts, for the most part, are willing to go as far as they can toward helping to see that the desires of the deceased are carried out. But they also must consider a counter-vailing policy that dictates that they should put limitations on the ability of the "dead hand" to rule from the grave. This consideration arose in the case of *Shapira v. Union National Bank*,[25] where a father's will required his sons to marry Jewish girls as a condition

23. 388 N.Y.S. 2d 993, 996. Apparently neither lawyer called the court's attention to the fact that Maimonides ruled to the contrary. See R. Gordis, *Love and Sex — A Modern Jewish Perspective* (1978), ch. 14, n. 28.
24. 388 N.Y.S. 2d 993, 997.
25. 39 Ohio Misc. 28, 315 N.E. 2d 825 (C.P., Probate Div. 1974).

to their partaking of the fruits of his estate. If they were not so married at the time of his death, the executor was to hold their portions for seven years. If, after this time, the condition was still not met, then their shares were to be given to the State of Israel.

Not one to be bossed around by his father, one of the sons brought suit against the executor, claiming that these provisions in his father's will were unconstitutional and violated public policy. The son based his constitutional argument heavily on the case of *Loving v. Virginia*, a landmark United States Supreme Court opinion that had struck down a state law which prevented blacks and whites from marrying each other.[26] As the Court there stated, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[27] Certainly, the son reasoned, his freedom was being constrained by his father's restrictive will.

Unfortunately for the son, the court did not share his view of the will provisions. In upholding the will, the court concluded that it was not enforcing a restriction on the *right to marry*, but on the *right to receive property by will*, a right which is somewhat less essential.

As seen in other cases, the court here showed a high degree of sensitivity to Jewish ideals and beliefs. In light of the fact that, should the sons fail to meet the criteria, their shares would to go Israel, the court noticed in the father's will a clear desire to preserve the Jewish faith, if not through his sons, then at least through aid to the Jewish homeland.

Kashrut

The laws regarding the proper preparation and eating of foods are another fertile area for disputes among members of the Jewish community. Because of the states' interest in regulating the preparation and sales of food products, various governmental bodies often enter the *kashrut* controversy by bringing the kosher food providers under the umbrella of civil law. This involvement often produces results that seem to press strongly against the "solid wall" that is supposed to separate church and state.

A Florida court addressed the question of the constitutionality of a city ordinance regulating the sale of kosher goods in the case of *Sossin Systems, Inc. v. City of Miami Beach*.[28] The owners of the Blackstone Hotel in that city had been convicted for representing Passover cakes as kosher when, in fact, they were not.

Appealing the conviction, the hotel owners raised the argument that the city ordinance was unconstitutional, since it backed a religious law with the support of the government's power. The appellate court chose

26. 388 U.S. 1, 87 S. Ct. 817, 18 L.Ed. 2d 1010 (1967).
27. 388 U.S. 1, 12.
28. 262 So. 2d 28 (3rd D.C.A. Fla. 1972).

not to address the question of the *establishment* of religion, but to argue for the law's constitutionality on the basis of the other prong of the freedom of religion clause, the *free exercise* of religious beliefs:[29]

> Rather than to prohibit free exercise of religion, the ordinance serves to safeguard the observance of its tenets, and to prohibit actions which improperly would interfere therewith.[30]

Thus, by addressing itself to this one aspect of the freedom of religion argument, the court skirted a potentially dangerous challenge to the law under attack.

Appearances often play vital roles in any religious observance. Not only must one do the right thing, but he must also give the outward appearance of acting properly. This principle was demonstrated in 1964 in New York when a civil court heard the case of *People v. Johnson Kosher Meat Products, Inc.*[31] A butcher had affixed the proper kosher tag to his meat, but had not labelled the meat to show that its draining, soaking, salting and handling were performed by Sabbath observers, a requirement of the state's Agriculture and Market Law. Through all this, however, there was no indication that there had been an actual violation of the *kashrut* laws. Thus, here was a situation where state law appeared to be even stricter than religious rules. Because the company had not alerted the public to the fact that all proper methods had been followed, the court levied a nominal fine of twenty-five dollars.

That keeping kosher is serious business is well demonstrated in a 1964 California case.[32] The plaintiff there had delivered kosher chickens to the Beverly Hilton Hotel for a Bond dinner. The defendant, who was formerly the supervising rabbi of the plaintiff's business, apparently spread the rumor that the chickens were not kosher. Not only that, but there was also some evidence that this disgruntled former employee had instructed the plaintiff's delivery personnel to take the chickens to the hotel in the middle of the Sabbath.

As a result of the rumors, the State Kosher Food Inspector brought charges against the plaintiff, charges of which he was later acquitted. Naturally, the story reached the California Jewish Press, where it was given wide circulation within the Jewish community. To aid in the circulation process, the former supervisor bought a thousand copies of the paper and stood outside synagogues distributing them to people as they left services on Saturday morning.

---

29. The first article of the Bill of Rights speaks of a two-pronged prohibition: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *U.S. Const.* amend. I.
30. 262 So. 2d 28, 30.
31. 42 Misc. 2d 534, 248 N.Y.S. 2d 429 (Civ. Ct. 1964).
32. *Erlich v. Etner*, 224 Cal. App. 2d 69, 36 Cal. Rptr. 256 (2d Dist. 1964).

When the charges proved to be false, the food provider sued his former employee for trade libel, and received a rather substantial award of $30,000 in compensatory damages and another $5,000 for punitive damages. While the decision that held the defendant liable was affirmed on appeal, the damage award was reversed for technical legal reasons.[33] But the principle remained that such damage to a company's reputation for keeping kosher could be compensated through the legal process.

Jews and Juries

We all know that life in American society goes on undisturbed while many of us are enjoying the High Holidays. But can our observance possibly hurt others? Two cases that arose in Florida and New York addressed this very serious question.

Grech v. Florida,[34] a 1971 case, dealt with the appeal of an Italian man who had been convicted of a number of crimes, among them robbery and burglary. What made his appeal unique was his argument that he had been convicted by other than a jury of his peers. His trial had started on Yom Kippur, and the trial judge had excused all prospective Jewish jurors.

His argument met with a rather deaf ear from the appellate court, which did not go into any significant detail in determining that this white male of Italian descent was not prejudiced by the actions of the trial judge. Likening this exclusion to that given jurors for valid medical reasons, the court ruled that the trial judge had not abused the discretion which he is allowed in granting excuses from jury duty.[35]

A similar result was reached in New York when a Jewish defendant tried to have his indictment dismissed on the grounds that Orthodox Jews had been systematically excluded from a grand jury that had convened in the period between Rosh Hashonah and Yom Kippur.[36]

His argument might have succeeded had he challenged the exclusion of all Jews. But since he limited his argument to Orthodox ones, the court had to wrestle with how to define this term. Noting that virtually no one in America could observe all the mizvot, the court concluded that

> no Jew can truly judge another as to his degree of Orthodoxy, because Orthodoxy is not in the eye of the beholder, but rests in the mind and heart of the beholden.[37]

Because the court could not tell who was Orthodox, it had no basis on

33. In order to be awarded damages for trade libel, the plaintiff must show evidence of actual pecuniary loss, such as a loss of customers because of the libel. As this was not done here, the court nullified the trial court's damage award.
34. 243 So. 2d 216 (3d D.C.A. Fla. 1971).
35. Grech's argument also failed in federal court. *Grech v. Wainwright*, 492 F. 2d 747 (5th Cir. 1974).
36. *People v. Goodman*, 92 Misc. 2d 927, 402 N.Y.S. 2d 114 (Sup. Ct. 1978).
37. 402 N.Y.S. 2d 114, 118.

which it could judge whether this "class" of people had been systematically excluded. Thus, the defendant's motion was denied.

One Special Case

Although I indicated at the outset of this article that I would not delve into fundamental Constitutional issues, I feel that it is necessary to discuss the case of Mr. Binstock, a Jewish meat market operator who sold food in Mountaindale, New York, on Sunday, in violation of the law. When the state took him to court, the judge very carefully examined all the pertinent facts.[38] It seemed somewhat odd to him that Binstock should be prosecuted here, since the only house of worship in town was a synagogue. But how could the judge get around the obvious wording of the law?

One way was to read a legislative intent into the law. Here the judge reasoned that, because there were no churches in the area, Binstock could not have *seriously* interrupted the religious repose and liberty of the good people of Mountaindale. And, according to the Judge, it was such serious interruptions that the Legislature was aiming at when it passed the Sunday closing law. Thus, Binstock was found not guilty.

Perhaps one more fact about this case should be known — the presiding Judge was named Milton Levine.

Conclusion

"If there arise a matter too hard for thee in judgment . . . then shalt thou arise, and get thee up unto the place which the Lord thy God shall choose. . . . And thou shalt do according to the tenor of the sentence, which they shall declare unto thee from that place which the Lord shall choose; and thou shalt observe to do according to all that they shall teach thee."[39] These are merely two of the many references in the Torah showing the importance of law and judicial system to the Jewish people. In American society today, Jews can rarely turn to a court of their own members to decide matters of religious import.[40] While it is most likely true that many of these controversies never reach the American courts, it is clear from this study that a number of these problems do ultimately come to be resolved by judges who may not truly appreciate the significance of their decisions. Yet the reported cases give evidence that American judges have a high degree of sensitivity to these problems, a realization that they should not interfere in internal theoretical squabbles, and a willingness to decide effectively in cases where established legal principles provide guideposts for resolution.

---

38. *People v. Binstock*, 7 Misc. 2d 1039, 170 N.Y.S. 2d 133 (Spec. Sess. 1957).
39. Deuteronomy 17:8, 10.
40. One exception is the Jewish Conciliation Board of America. See Schaeffer, "Justice Justice Shalt Thou Follow," 79 *Case & Comment* 37 (Jul-Aug, 1974).

Arendt Revisited

Review-Essay by **HENRY L. FEINGOLD**

Hannah Arendt. The Jew as Pariah: Jewish Identity and Politics in the Modern Age. Edited, with an introductory essay, by RON H. FELDMAN. New York, Grove Press, Inc., 1978. 288 pp. $12.50

OVER FIFTEEN YEARS HAVE PASSED SINCE the furor over Hannah Arendt's *Eichmann In Jerusalem*. At that time she was read out of the Jewish community, not merely for what she had written regarding the role of Jewish leadership during the Holocaust. Few actually understood what the indictment was all about, since that required not only a reading of her early essays on Zionism, but a familiarity with the first section of *The Origins of Totalitarianism*. It was, one suspects, rather the caustic, unforgiving, often small-minded tone of that work which nettled so. There has always been a wholesome tradition of criticism, even disputatiousness, among Jewish intellectuals. Irving Howe signals out that characteristic as the hallmark of the Jewish intellectual circles of New York. But, somehow, Arendt's posture placed her beyond the fold. As the furor over *Eichmann* mounted she became more vitriolic. She was hurt. The Jewish leaders did not understand the value of her autonomous vision; (*Selbstdenken*, she called it, after a notion taken from Lessing). She felt that she had been misunderstood and misinterpreted by a paranoic, shortsighted Jewish leadership and their lackey writers who were unable to tolerate cirticism.

Now, some of her essays written between 1943 and 1966 have been collected, with an introductory essay by Ron Feldman. The work weaves together three components of her thinking about Jewish history and politics: the pariah as rebel, Zionism and the Jewish state, and the Eichmann controversy. It is an interesting book, not so much for Feldman's attempt to rehabilitate her, something that she would have objected to in any case, but because it clearly demonstrates that the conceptualization on which the classic *Origins* was based stemmed from her earlier preoccupation with Jewish political culture. Rather than being exceptional, Jewish history and the Jewish condition were prototypical. "It is no mere accident," she observed in 1946, "that the catastrophic defeats of the people of Europe began with the catastrophe of the Jewish people." Similarly, her animus against the Jewish leadership of the Jewish Councils merely echoes what she had already observed about Zionist

HENRY L. FEINGOLD *is professor of history at the Graduate Center of CUNY and at Baruch College.*

leadership during the Holocaust and shortly before the founding of the state. The only thing that should have surprised the readers of *Eichmann* was its unbalanced judgment and its unkind tone.

It is, first, her reading of Jewish history as a flight from the *polis* and, second, her adoption and idealization of the "hidden tradition" of certain Jewish intellectuals whom she calls "conscious pariahs," which make it appear that she places much of the responsibility for the catastrophe of the Holocaust on the Jewish people itself. To understand the first one must momentarily go back to that section of the *Origins* where she sets out the concept of the *polis*. On it, she bases her idea of how politics should be lived, and, in the simplest terms, it means that politics should be practiced from the bottom up in the public arena by responsible *citoyens*. Through active participation in the political arena the citizenry shapes its world, enters into history, matches power with responsibility and, of course, accepts responsibility for its fate. Failure to participate in the political arena, fleeing from politics, as the Jews did after the Sabbatian catastrophe, denied them not only some input into their destiny but even a realistic political vision of what was possible for them. Politics must be experienced to be understood. That is, of course, a much simplifed version of a complex principle, but it is sufficient to explain her opposition to the Herzlian brand of Zionism. She viewed it and, later, the establishment of the state to which it led, as a flight from the *polis* which had in it the seeds of yet another catastrophe which the Jewish world could not survive. She supported the *yishuv*, especially the kibbuz movement and The Hebrew University, but her political center of gravity remained Eurocentric. She felt that by detaching themselves from Europe and fleeing to an untenable and occupied place in the Mediterranean, rather than joining other groups anxious to restructure European political life, Jews were once again risking becoming the victims of historical processes that they barely understood. The principle misconception of Herzlian Zionism was the idea that anti-Semitism was endemic and perennial. For Arendt it was not anti-Semitism *per se* which victimized the Jewish people. That was merely a convenient container for an antagonism which related to the anomalous position of Jews in society. There they were alone, allied with neither a class nor a political grouping that might bring a modicum of security. Instead, they depended directly on the support of those who held power — kings, lords, governors. The denouement was invevitable when Jews linked themselves to the nation-state which, in some measure, they helped finance. They then became the target of every class and social stratum that came into conflict with the state. They pursued the "radiant power of fame" rather than actual power, they became the symbols of society and even its cultural mediators and, unbeknown to themselves, vulnerable to attack from every group that society rejected or mistreated. They were vulnerable because, ultimately, they lost function. Society could be managed without them. Arendt uses the striking term

"worldlessness" to describe that condition of being detached, depoliticized, functionless, unable to conceive of reality and utterly vulnerable. The totalitarian state functions by creating such worldlessness of its citizenry which, unable to resist, is then subject to the relentless power of the state. In Europe it happened to Jews first, but the logic of totalitarianism is that they would have been joined by others. The physical destruction of Jewish lives during the Holocaust, according to Arendt's conceptualization, was merely the last step in a proces in which spiritual and political extermination preceded actual mass murder. The first steps were depolitization, separation from their history and loss of function, which lead inevitably, to a loss of a sense of self.

The totalitarian state learned about solving problems, real and imagined, by mass murder, through the nineteenth century experience with imperialism. Urged on by the privatistic desire of the bourgeoisie for empire and profit, the imperialist powers plundered the people of the world and, ultimately, turned against each other. After World War I it became apparent that the state could not even fulfill its function of guaranteeing internal and external security. It had, according to Arendt, become obsolete. But the bureaucracy, which did not change, had learned an important lesson during the imperialist and World War I phase. It was able to objectify human-kind like so many units on a production chart. That procedure was necessary in its dealing with subject people and with ordering thousands to their deaths during the war. Even the element of racialism was present in the imperialistic relationship. How well the lesson was learned was revealed in the death camps.

Once these conceptualizations are understood, Arendt's reservations about the Biltmore program and the establishment of the Jewish state can come into clearer focus. The Jews were establishing a state precisely at the historical juncture when it had become not only obsolete but malignant. She was convinced that such a state merely mimicked the traditional relationship of Jews to power holders. It would be a "pseudo sovereignty" at the beck and call of larger powers who would use the Jewish state for their own interest and abandon it when they no longer required its services. The victims would be the Arab population of Palestine. The basic assumption of Herzlian Zionism, "the country without a people" for the "people without a country," conveniently overlooked the existence of the Palestinians. To make these people subjects in their own country would not only be a great injustice, but it would brutalize the Jews whose activities in Palestine, especially the kibbuz movement, had demonstrated that they were not merely a people like others but were capable of evolving new societal forms of organization to generate justice and righteousness. In 1948, Arendt concluded that "a Jewish state can only be erected at the expense of a Jewish homeland."

That conclusion placed her almost totally outside of the new Zionist consensus which, after the Holocaust, had taken hold everywhere in the

Jewish community. There were others, of course, beginning with Arthur Ruppin and, later, Judah Magnes and Martin Buber and even Nahum Goldmann, who shared much of her view, especially regarding the Arab question. As a rule, they did not suffer the "slings and arrows" reserved for her. Somehow, from Magnes and Buber the message came forth as from the prophets of old, urging the Jews to seek justice and righteousness. When she said it, Jews viewed it as the hateful indictment of an outsider.

The reason for the difference in reception was Arendt's assumption of the status of a "conscious pariah." On the face of it, pariahdom, which smacks of avoidance because of disease, is not a particularly desirable postion. But Arendt reveled in it. For westernized European Jews like herself, conscious that emancipation had been a failure and that Jews were in limbo, unable fully to enter into European society and yet unwilling to revert to a tribal status, the response had to be to celebrate their role as outsiders. The position of "conscious pariah" was infinitely preferable to that of "parvenu." That was the label which she reserved for those Jews who aped the ways of the gentile and sought, by money transactions and the avid search for fame, to relieve the pain of being an outsider. Better the pariah who at least retained some dignity and generated *qualités* like "the Jewish heart, humanity, humor and disinterested intelligence." The Kafkas, the Rahel Varnhagens, the Walter Benjamins, Sholom Aleichem and Bernard Lazare would serve as the revolutionary change agents. Lazare, who most closely resembled her ideal model, had left the Herzlian fold because he wanted, not an escape from anti-Semitism, but the mobilization of the Jews as a people to fight against it. For Arendt, too, the quest for Zionists to be a people like other people was not only unworthy, but unrealizable, and smacked of assimilationism. Its motivation differed only in scale and place from that of the parvenu who also sought normality. She preferred the Zionism of Ahad Ha-am, who called for a regeneration of Jewish consciousness and dignity from the bottom up, the recreation of a Jewish folk and nation. That was something that parvenu "kooks" like Herzl could never understand; instead, they went, hat in hand, to the crowned heads of Europe to beg for a state before there was a Jewish nation. It was the old dependence.

All that sounds very much like the typically universalist position stemming from the European Left. However, when Gershom Scholem identified her position in that manner she quickly informed him that she had come to Marx rather late in her intellectual development and that if her conceptions could be rooted anywhere it was in German philosophy. But that may have been true only of the conceptualization itself; the alienated vision stemmed from her conviction that the "conscious pariah" was the only acceptable way that "the strands of Jewish genius" could be woven "into the general texture of European life." It was the enhancement of European life which concerned her. Yet there is something

incomplete in the denial of socialist inspiration. It contains too many similar ingredients: struggle, praxis, the hope for a just social order. In fact, Arendt's claims to acceptance in the Jewish folds, as well as her conceptualizations, bear a startling resemblance to those of Isaac Deutcher who, in his essay, the "Non-Jewish Jew" also argued that the radical intellectual Jew was very much part of the Jewish tradition, perhaps its most generative part. Arendt was not a self-hating Jew. She considered her Jewishness an "indisputable factual factum" of her life. She would have considered parting from it in any way a form of betrayal. She even went so far as to admit that a wrong done to Jews grieved her more than a wrong done to other people. She felt she belonged to them, but she had chosen to dig in at the half-way house of the conscious pariah, which meant being neither fully European nor fully Jewish. That choice posed all kinds of problems of which she was probably only dimly aware.

The problem is to account for the carping, jaundiced quality of her narrative in the early essays on Zionism and in sections of *Eichmann* when she talks of Jewish leadership. How far it could extend was illustrated by her indictment of the Jewish Councils during the Holocaust and her broad hint that even worse could be said about the Rabbis. Had the Jews not been organized and led, more might have survived. She did not mean that the leadership betrayed the Jews but, as she explained to Scholem, she felt that they should have chosen the alternative of "nonparticipation." She was poorly informed for, as Isaiah Trunk would later point out in *Judenrat*, such an alternative, even if it had been available, would have made little difference. Members of the Jewish Councils were chosen capriciously by the SS masters. Her indictment may, in fact, have a source which antedates the Eichmann trial. It is part of the sustained charge against the leadership of the *yishuv* which began when they entered into the *haʿavarah* (exchange) agreement with Berlin at the very moment when, in the 30s, diaspora Jewry was attempting to mount a boycott of German goods. For Arendt that was an unforgivable, short-sighted collaboration, one of many examples that she could cite concerning the incompetence of the Zionist establishment. Her critique was, thus, far more corrosive than that of a dissident like Magnes, with whom she sympathized. She, in effect, threw down the gauntlet and declared a verbal war against Zionist leadership and she did so from the outside as a conscious pariah which, in the end, demanded not only that she alienate herself from European society but from the Jewish world as well. It was an awesome price to pay for a value-free position.

The problematic inherent in her position came to a head when she arrived in Jerusalem to report on the Eichmann trial. Her reportage literally dripped with contempt for the court, for the trial process (although not for the right of Israel to hold such a trial) and only incidentally for a banal Eichmann. When Scholem informed her that he sensed a lack of *ahavat Yisrael* in the work, Arendt's reaction was defensively arrogant.

"I am not moved by any love of this sort," she responded, "and for two reasons: I have never in my life loved any people or collective. . . . Indeed I love only my friends and the kind of love I know and believe in is the love of persons." It was the reply of the conscious pariah. Jews were a tribe like any other and her detached posture required her to transcend such lowly passions as love of the tribe. For those who knew her there must have been a special paradox here, for it was the Jewish community which gave her employment in Youth Aliyah in Paris when she was forced to leave Germany, and it was the Jewish journals like *Jewish Social Studies, Jewish Frontiers* and the *Menorah Journal* which early recognized the brilliance behind her heavy Teutonic prose and conceptualization.

If Arendt's *Selbstdenken* had any weakness at all, it was in her seeming inability to change her position once the conceptualization had been made. She stuck to her position regarding the difference between Herzlian and Aḥad Ha-am type Zionism even after the distinction had been overtaken by events. Among secularized American Jews a type of Zionism, call it "Israelism," came to form the centerpiece of a new civil religion. Arendt would probably have considered it innocuous, but it did contain the idea of Jewish peoplehood in its most pristine form. It gave to American Jewry what they never had before, a modicum of coherence and unity which was a practical necessity if they wanted a specific Jewish presence in the American political arena. Ironically, Arendt's conception of the polis required such a commonality but she could not accept its prerequisite since she did not relate to peoplehood, only to persons. There could be no political community if everyone assumed the posture of the conscious pariah and there could be no conscious pariah with no Jewish community to be separate from. Her dilemma was insoluble.

Yet, if Arendt's posture was quixotic and her writing about Jews, especially their political culture, inaccurate and often unkind, she could also be remarkably prescient about what was in store for them. As early as 1944 she foresaw with uncanny accuracy the agonizing problems that would face the Jewish state. It may not have required great insight to predict the unrelenting hostility of the Arab world to it. There had been enough trouble with the Palestinians in the twenties and thirties to demonstrate that. But her prediction of the problems of Israel-Diaspora relations, her foretelling of the Massada complex, her warning about the garrison state mentality, her fear of the waning of *ḥaluziut* and of the hope of the kibbuẓ movement, and her prediction of the dependence on America and American Jewry, all made with extraordinary precision at a very early date, should alert us to the fact that we were dealing with no ordinary political thinker. When one gets beyond the frequently bad writing and the heavy-handed irony there is often the reward of brilliant insights and intuition.

Arendt could never understand or forgive the reception that the *Eichmann* book got in Jewish circles because, like so many people utterly

committed to the life of the mind, she was emotionally obtuse. She seemed to be completely unaware of her own ambivalent feelings regarding Judaism and, perhaps, Jewishness as well. What she thought was an objective critique of the Eichmann trial was, in fact, jaundiced and hostile. She delivered the most damning charges in an almost flippant way and then was astonished at the reaction of thinking Jews. It was as if she had not realized what she had said and what it meant. To those who were appalled it was more than the alienated vision that was involved in her reportage. It was an alienated sense of belonging and concern that they perceived. The language of the conscious pariah, she should have known, came to that.

Yet, in that very alienation, in that strenuous intellectual metabolism, in that complete, almost religious, devotion to mind for mind's sake, one can recognize a relation to a certain Jewish prototype, a kind of secular Talmudist. Such people contribute notably to the world of ideas and are reared in a Jewish incubator. In the end, one concludes that there is, in fact, a need for the autonomous vision which Arendt cultivated. Without it, the rich intellectual life, which is for many what makes being Jewish so attractive, may become smug and provincial. Whatever else may have been Arendt's weaknesses, she was a provocative Jewish thinker. For that reason alone it may be time to reclaim her.

We are frequently asked for reprints of individual articles. While we cannot accede to such requests, many back issues are available for $2.75 each. Orders must be accompanied with payment.

JUDAISM

$2.75

WINTER 1980